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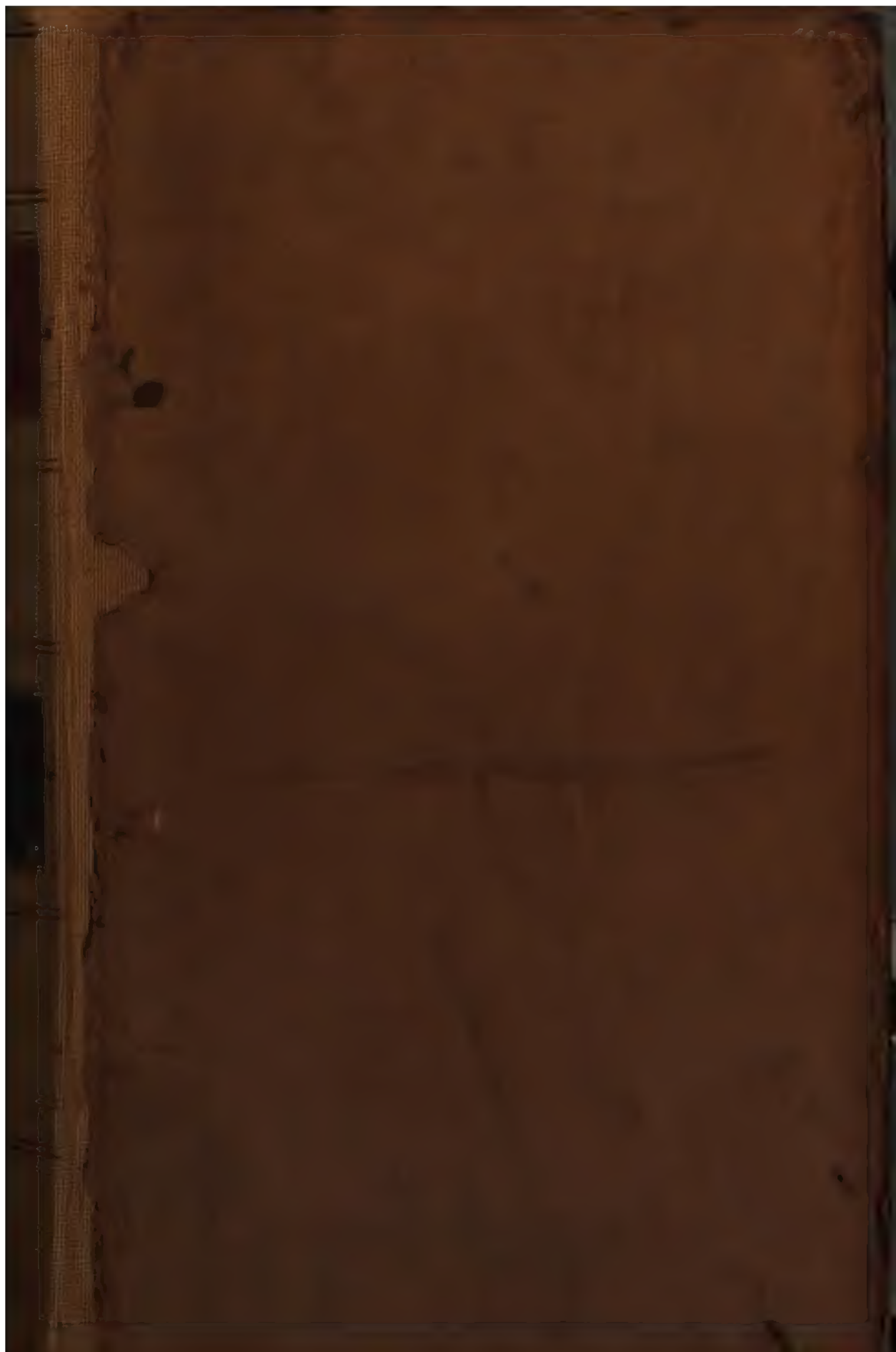
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REPORTS
OF
CASES IN BANKRUPTCY,

ARGUED AND DETERMINED

IN

THE COURT OF REVIEW,

AND ON

APPEAL BEFORE THE LORD CHANCELLOR.

By EDWARD E. DEACON AND EDWARD CHITTY, Esqrs.
BARRISTERS AT LAW.

VOL. II.

FROM TRINITY TERM, 1832, TO TRINITY TERM, 1833.

LONDON:
SAUNDERS AND BENNING, LAW BOOKSELLERS,
(SUCCESSORS TO J. BUTTERWORTH AND SON,)
43, FLEET-STREET.

1834.



THE
END

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OF THE
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ERRATA.

Page 356. — *Instead of* “ But it appears,” *down to* “ presenting a petition for re-hearing,” *read,* “ I am not aware of the existence of any rule which limits an application for a re-hearing to the period of six months. But it appears to me that even if such a rule do exist, it cannot justly be said that such a rule has in this instance been broken in upon. If such a rule exists, the principle upon which such rule must be founded,”

CASES IN BANKRUPTCY

ARGUED AND DETERMINED

IN

The Court of Review,

IN

EASTER AND TRINITY TERMS,

IN THE

SECOND YEAR OF THE REIGN OF WILLIAM IV.

Ex parte RICHARDSON PART, HENRY BRIDGMAN, and
JOHN WYATT.—In the matter of DANIEL HOPE and
CORNELIUS HOPE.

Westminster,
May 1, 1832.

THIS was a petition by assignees, for the consolidation of the joint and separate estates of the bankrupts. The commission was issued on the 15th October 1831, the bankrupts having for some time previously carried on the business of silk-manufacturers in copartnership, under the firm of *Daniel Hope & Son*,—and one of the bankrupts, *Daniel Hope*, having also carried on the business of a bleacher in his separate name. It appeared, however, that the fixtures and utensils of trade upon the bleach works were paid for out of the partnership funds of *Daniel Hope & Son*, and that considerable sums of money drawn from the same fund

Where the joint and separate creditors, at a meeting duly convened for that purpose, agree to consolidate the two estates, the Court will refer it to the Commissioner to inquire whether such consolidation is for the general benefit; but will not, upon such a resolution alone, bind the interests of the absent creditors of both classes.

1832.
 In part
 paid
 and others.

were afterwards expended upon them; although the firm was insolvent when the bleach-works were purchased. The books of account and monies of the bleaching concern were kept by *Cornelius Hope* at the warehouse of the partnership, and orders for the bleaching concern were received there. *Daniel Hope* was not debited with the amount of the money drawn out by him on account of the bleach works: *Cornelius Hope* had no separate estate: but under the supposition that the bleaching concern belonged to *Daniel Hope*, and formed a portion of his separate estate, distinct accounts had been kept under the bankruptcy of the assets arising from the bleaching concern, and those arising from the joint estate, and several debts in respect of the bleaching concern had been proved against the separate estate of *Daniel Hope*. The amount of the debts proved against the separate estate of *Daniel Hope*, the greatest part of which were debts due in respect of the bleaching concern, was £12,500, and the amount proved against the joint estate was £5,000. At a meeting of creditors duly convened, which was attended by several creditors who had proved debts as well against the joint as the separate estates, the assignees were authorized to present a petition for consolidating the two estates for the equal benefit of all the creditors, joint and separate, without any distinction of priority, and this petition was accordingly presented to the court.

Mr. Justice Parker, in support of the petition, cited *Ex parte Frost* and *Ex parte Trenchard* and said that the creditors of the creditors is a meeting called

for that purpose, formed a sufficient reason why the Court should refer it to the Commissioners to inquire if the consolidation proposed was for the general benefit; but that the Court would not, upon such a resolution alone, bind the interests of the absent creditors of both classes.

1832.

Ex parte
PART
and others.

The COURT, in accordance with this decision, referred it to the Commissioner to ascertain whether the consolidation proposed would be for the benefit of the general body of the creditors.

Ex parte CUTTING.—In the matter of THORNDIKE.

Westminster,
May 1.

THIS was a petition of a devisee under the will of one *Thomas Cutting*, deceased, of which the bankrupt was one of the executors; and the prayer was, that the moiety of a sum of 1132*l.*, which had been paid under the bankruptcy into the hands of the accountant-general, might be paid to the petitioner, as the proportion to which she was entitled under the trusts of the will. The petition, it appeared, had been only served on the assignees and the bankrupt.

Where the bankrupt is one of two executors, the petition of a party interested under the will must be served on the other executor, as well as on the bankrupt and the assignees.

The COURT said, that the petition should have been served on the other executor, but made the order as prayed, conditionally, on producing an affidavit of such service, or of the consent of the executor to the application.

1839.

Westminster,
May 2.

Where one of three assignees declines to act, the two acting assignees should join in the petition for a new choice; or if one only presents the petition, it should be served upon the other acting assignee.

Ex parte HARRIS.—In the matter of MATTHIE.

THIS was a petition to enlarge the time for the bankrupt's surrender, and for a new choice of assignees, one of the three already chosen having declined to act. The petition was presented by one of the two acting assignees, on behalf of himself and the other acting assignee.

The COURT thought that the other acting assignee ought to have joined in the petition, or that he should at least have been served with it, as well as the assignee who had declined to act.

Ex parte WORTH.—In the matter of SWANNELL.

Same day.

A petition for leave to prove must state the grounds on which the proof was rejected by the Commissioner.

THIS was a petition of the executors and *cestui que trusts* under a will, praying that the executors might be permitted to prove a debt of 3000*l.* against the bankrupt's estate, and apply the dividends according to the trusts of the will.

Mr. CHING for the petitioners.

Mr. KEE for the assignees, objected, that the executors had never legally applied to the Commissioners to prove the debt, having made the application at a meeting not regularly convened for receiving proof of debts: which was not such an application as would warrant this petition.

Sir G. ROSE.—A creditor may go before the Commissioners to prove his debt, as a matter of course, at any public meeting; or he may have one called at his own expense. But in this case it is not stated, on what grounds the proof was rejected; which is an essential allegation in an application of this nature. If the petitioners were not executors, the petition might be dismissed; but the Court is more lenient to trustees. The petitioners therefore may have liberty to tender their proof to the Commissioners, or not, as they may be advised, and they may come again to this Court without a supplementary petition.

1832.

Ex parte
WORTH.

The rest of the COURT concurring, the order was made accordingly.

Ex parte ASHTON.—In the matter of ASHTON.

May 2.

THE bankrupt in this case petitioned to supersede the fiat issued against him, on the ground of the insufficiency of the petitioning creditor's debt. It appeared, that the bankrupt was indebted to the petitioning creditor in the sum of 212*l.*, and that, as a collateral security for the payment of it, he had transferred to him bills of lading of a quantity of butter; and that the petitioning creditor had signed a memorandum acknowledging that he had received these bills of lading in consideration of the money due to him from the bankrupt. Before the delivery of the butter, however, the consignor had stopped it *in transitu*. The bills of lading, therefore, became of no value to the petitioning creditor.

Where the consignee transfers bills of lading to a creditor, as a security for his debt, and the consignor stops the goods *in transitu*, the creditor may issue a fiat against the consignee on his original debts.

1832.

Ex parte
Moonr.

the petitioner's debt, provided the petitioner paid the costs of this application.

Sir G. ROSE.—You cannot consent to an order of this description, as the bankrupt's wife is not before the Court. The interest in question is, to a certain extent, the interest of the wife, and we can make no order in her absence. The petitioner is in possession of a legal security, and had no occasion to come before this Court for a sale.

The rest of the COURT concurring, the petition was dismissed with costs.

Ex parte ELIZABETH BRIGHT.—In the matter of JOHN CAMPBELL.

Westminster,

May 2.

Where a creditor addresses a written request to assignees, in general terms, to pay "the dividends made on the bankrupt's estate" to A. B., the assignees are justified in paying subsequent dividends to A. B., until they have notice from the creditor that he has revoked A. B.'s authority.

THIS was a petition of the executrix of a creditor against the surviving assignees of the bankrupt, for the payment of a dividend. It appeared, that two dividends had been previously declared in the years 1823 and 1825; upon which occasions the petitioner, not being able through illness to attend in person to receive them, authorized the assignees to pay them to one Gooch on her account. The authority was in these terms :—

"To the assignees of Mr. John Campbell's estate.

"Gentlemen,—I have requested my son-in-law, Mr. John Burton Gooch, to sign a receipt in my name for the dividends made on Mr. John Campbell's estate.

"I am, &c.

"London, 13th Dec. 1825. Elizabeth Bright."

These dividends were accordingly paid by Mr. Brogden, a deceased assignee, to Gooch, who signed a re-

1832.

Ex parte
BRIGHT.

ceipt for them, and left with the assignee the written authority from Mrs. *Bright*. Between five and six years afterwards, namely, on the 21st June 1831, a final dividend was declared, which was applied for and received by *Gooch* of Mr. *Brogden* under the same authority, which had never been in any manner revoked by Mrs. *Bright*; and *Gooch* signed a receipt for this dividend in the same manner as for the two former ones.

In an affidavit filed in answer to the facts stated in the petition, *Gooch* swore, that Mrs. *Bright* verbally authorized him to receive *all* the dividends that might be declared on the debt she had proved under the commission, and that such was her intention when she gave him the written authority above mentioned; and that after the receipt of the last dividend, Mrs. *Bright* verbally agreed to take grocery goods of him to the amount of the dividend, and that he accordingly supplied her with a portion of such goods in part payment of the sum he had so received.

The petitioner filed an affidavit in reply, in which she denied having verbally authorized *Gooch* to receive *all* the dividends, or having ever agreed to receive, or having in fact ever received, from *Gooch* any goods whatever in payment of the dividend in question. But two other witnesses made affidavits contradicting this statement, and confirming the representation of *Gooch* as to the alleged agreement, and as to his having supplied her with grocery goods in part satisfaction of the dividend; and one of these witnesses swore, that after the presentation of the petition the petitioner told *Gooch*, she would abandon the proceedings and pay her lawyer's bill; which she expressed a wish that *Gooch* should pre-

1832.

*Ex parte
Bacon.*

viciously examine for her, to see that all was right. And it appeared, that she in fact sent the bill of Messrs. *Pasmore* and *Taylor*, her solicitors, to *Gooch* for this purpose, accompanied with the following letter addressed to her from Mr. *Pasmore*, which was dated on the 10th February 1832:—

“ Mr. *Pasmore's* compliments to Mrs. *Bright*, he has not seen Mr. *Gooch* on the subject of the costs. If Mrs. *Bright* had proceeded, her costs would have been paid by the assignees of *Campbell*. As she stayed the proceedings, the money is lost. Mr. *P.* will be obliged by Mrs. *Bright* discharging the account.”

Mr. *S. Pasmore* appeared in support of the petition, and contended that the written authority given by the petitioner to her son-in-law did not extend beyond the two first dividends declared under the bankrupt's estate, and that Mr. *Brogden* was not warranted in paying the last dividend to *Gooch*, without a fresh order from the petitioner.

Mr. *Deacon*, for the assignees, submitted that the terms of the authority were general, and applied to all dividends that might be declared under the commission. That the authority, being filed by Mr. *Brogden's* clerk, with the other documents relating to the payment of the dividends under this estate, had the same effect, until it was revoked, as a general power of attorney given by a creditor to receive dividends, or to do any other act in regard to a bankrupt's estate. If it was the real intention of the petitioner to countermand the authority she had given to her son-in-law, and which she knew was deposited as a voucher with

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Bright.

the assignees, she ought to have given formal notice to the assignees for this purpose. But the affidavits filed in reply to her own affidavit plainly show, that such was not her intention; for after *Gooch* had received the dividend in question, she agreed to take grocery goods from him in satisfaction of the amount, and part of which goods he afterwards actually supplied her with. This, therefore, was a clear recognition of his authority to receive the last dividend. The note, too, which was written to Mrs. *Bright* by Mr. *Pasmore*, the attorney, afforded some insight into the real object of this application; it being evident, from the expressions contained in that document, that Mrs. *Bright* herself thought she had no grounds for this petition; and that it was, in fact, not her petition, but merely that of Mr. *Pasmore* for his costs.

ERSKINE, C. J.—I am of opinion, that the assignees were in this case justified in paying the last dividend to *Gooch*, the petitioner's son-in-law; and that the present application is only an endeavour to make third parties, namely, the assignees, pay the expenses which have been incurred in presenting this petition; the recognition, on the part of the petitioner, of the payment to *Gooch* having been made since the petition was presented.

Sir A. PELL.—If the petitioner had intended to limit the authority to the payment of the dividends which had been already declared, she should have so expressed it, or have afterwards given the assignees notice not to pay any further dividends to *Gooch*. The amount of the third dividend was but 10*l.*, and I cannot

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BRIGHT.

help expressing my regret, that these family bickerings between Mrs. *Bright* and her son-in-law should be made instrumental to the annoyance of third parties; for it is quite clear, that the principal object in proceeding with this petition was to saddle the assignees with the costs.

Sir J. Cross.—It appears, that *Gooch* having failed in paying the former dividends over to the petitioner, she was improperly advised to apply to this Court to make the assignees pay over again the last dividend, instead of countermanding *Gooch's* authority to receive it. It is hard upon her to be obliged to pay the costs of this proceeding, though the Court cannot do justice to the assignees, but by so decreeing it.

Sir G. Rose concurring,

The petition was dismissed with costs.

Ex parte HOWELL GWYN.—In the matter of BENJAMIN RICE.

Westminster,
May 2 and 5.

The charge of 10s. per cent. for commission, besides the legal interest, on a loan of money, is not usurious, if it is referable to trouble and expense *bond fide* incurred by the lender; although he may not be a banker, or a person engaged in trade, or although the money lent is his own, and not that of other persons.

THE petition stated, that *William Gwyn*, deceased, (the father of the petitioner,) and the bankrupt, had divers pecuniary dealings and transactions together during the lifetime of the said *W. Gwyn*; in the course of which *W. Gwyn* was in the habit of discounting divers promissory notes and bills of exchange for the bankrupt. That the bankrupt became indebted to *W. Gwyn* in a considerable sum of money on account of these transactions, and, for securing the repayment of the balance which should from time to time be due,

The bankrupt's affidavit in support of the respondent's case is admissible in evidence, notwithstanding he has previously made one in support of the petition. But when the party is dead, who could best have answered such affidavit, the bankrupt's allegations, uncorroborated, will not go for much.

deposited with *Gwyn* a promissory note for 1000*l.*, made by one *T. Chinn*, dated at Merthyr Tydvil the 13th February 1830, and payable to the bankrupt or his order twelve months after date, with interest at 5*l.* per cent.; but which note was not indorsed by the bankrupt. The bankrupt had also subsequently deposited by way of equitable mortgage, as a further security for this balance, a certain lease for lives dated the 12th February 1818, which had been granted to his mother, *Mary Rice*, by one *Henry Grant*; whereby the said *H. Grant* demised to the said *M. Rice*, a certain messuage with the appurtenances in the town of Neath, in the county of Glamorgan, for the lives of the bankrupt and two other children of the said *M. Rice*, and the life of the survivor or longest liver of them. *W. Gwyn* died on the 5th August 1830, having by his will appointed the petitioner his executor when he should attain the age of twenty-five years. In the mean time, *John Richard Roberts* and *Edward Richard Roberts*, as his executors, duly proved the will, and took upon themselves the execution thereof. On the 9th of August 1831, Mr. *Charles Roberts*, the solicitor of the executors, settled an account with the bankrupt of the dealings and transactions between him and *W. Gwyn*, deceased, when it was ascertained that there was a balance due to the estate of *W. Gwyn*, amounting to the sum of 370*l.* 16*s.*; for securing which balance, the bankrupt delivered to the said *C. Roberts* a bill of exchange dated 23d August 1831, and drawn by the bankrupt on the said *T. Chinn*, for the payment to the bankrupt's order of the said sum of 370*l.* 16*s.* four months after date; which bill was accepted by the said *T. Chinn*, and was indorsed by the bankrupt to the said *C. Roberts*, by

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Ex parte
GWYN.

1838.

In part
(1114).

Mr. Tamllyn appeared in support of the petition, and cited the case of *Carstairs v. Stein* (a), as an authority, to show that the charge of a commission of half per cent., for trouble and expense in discounting bills, did not amount to usury. [Sir G. Rose. In *Carstairs v. Stein* the parties taking the commission were bankers. That makes the difference.] It is admitted, there is no case which decides that the half per cent. may be taken by a person not a mercantile man. With respect to bankers, however, Lord Kenyon said in the case of *Chorley v. Livery* (b), that for trouble in transacting money negotiations a banker may as well receive a commission as a broker may for trouble in making sales; and that commission was a lawful charge, unless it was a cloak for usury. The case of *Mannings v. Carter* (c) is also to the same effect. As a banker has, therefore, the right to charge for trouble in transacting of a pecuniary nature, his charge has in this case no quality of a cloak or a pretence, for the trouble is in procuring the different bills which he discounts for the applicant and payee, and for the expense of postage for the charge on a banker in trade. He was at the time of a banker; and as the bills which he discounted for the bankrupt were at the same rate both at discount and payment as others he would have discounted payable at par, or at the current rate, and would probably at the rate of 10 per cent. when he received, he was obliged to supply an independent bill which was not to what the bill represented himself to be.

For there is another question in the case, namely, whether the different bank for the bankrupt, or himself

(a) 10 B. 117.

(b) 10 B. 117.

(c) 10 B. 117.

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Gwyn.

of the respondents is admissible in evidence, after he has made one in support of the petition. The affidavit in support of the case set up by the respondents cannot be considered in the nature of a cross-examination. For that in support of the petition, though sworn on the 18th April, was not filed until the 25th; while his affidavit for the respondents was filed as early as the 27th April, having been sworn, no doubt, as is the common practice, some days previously. The bankrupt here is an interested witness. His evidence cannot be received to increase, though it may to diminish, the fund; *Butler v. Cooke* (a), *Ex parte Burt* (b); and, in this case, his evidence on behalf of the respondents must necessarily tend to increase the funds of his estate. It would be unjust, also, to permit him to bring a charge of usury after so great a lapse of time, when the lender of the money is dead, and can now give no explanation of the transactions between him and the bankrupt.

Mr. *Swanston* and Mr. *Ching*, for the respondents, contended, that the bankrupt's affidavit was perfectly admissible, as it was in the nature of a cross-examination, and there was no new fact introduced. The petitioner has called the bankrupt to prove his debt, and we now call him to show how the debt arose. He has given evidence on one side, and we have a right to the whole truth on the other side. In the case of *Benfield v. Solomons* (c) Lord *Eldon* distinctly points out the mode, in which a bankrupt may protect his estate from usury. He puts the case of a mortgage made by the bankrupt for an usurious consideration, and says, that

(a) Cowp. 70.

(b) 1 Madd. 46.

(c) 9 Ves. 84.

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Gwyn.**

when “the creditor comes to prove in the ordinary proceeding, every other creditor, or even the bankrupt, might present a petition, which he has a mode of verifying that is not open to him upon a bill; the Court, upon his affidavits stating the usury, putting the creditor to answer, and upon a principle quite different from that which he obtains in a suit. For the plaintiff in a bill could not offer to redeem, without paying what was due; but by the jurisdiction in bankruptcy upon a petition, supported by the oath of the party interested, unanswered, the security is cut down altogether, not leaving the party a creditor even for what was actually advanced.”

With respect to the facts of the case, the affidavit of the bankrupt is quite uncontradicted; and the only question is, whether upon the account he has given of the transactions that took place between himself and the late Mr. Gwyn, there is not enough stated to make out the charge of usury. The Court will not presume in favour of the claims of deceased persons, merely because they are dead, but will require the legality of the consideration for a debt to be substantiated in the same manner as if the party was living. It is not denied that bankers, who in general have large establishments and employ numerous clerks in their business, may charge a reasonable commission for their trouble and expense in discounting bills for their customers. But in this case the party was not a banker, but an attorney; and according to the bankrupt's statement, which has never been contradicted, the money lent was not his own money, but that of other persons. The mere loan of money, without reference to any expense or trouble occasioned to the lender, will not justify the

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Gwyn.

duty of the Court, while the law on this subject remains in force, to give effect to it. As to the charge of usury being founded merely on the affidavit of the bankrupt,—it must be remembered that his affidavit stands wholly uncontradicted, which it might have been, if the statement of the bankrupt was unfounded in fact. And when so much is asked by a creditor, as is contained in the prayer of this petition, the Court is not in the habit of making an order, without the strictest inquiry.

ERSKINE, C. J.—The objection made to the prayer of this petition is, that the debt claimed by the petitioner, as the representative of the deceased creditor, was tainted with usury; but I confess, that that fact has not been made out to my satisfaction. With respect to the affidavit of the bankrupt in support of this charge, I think it was clearly admissible in evidence; for if his affidavit is admitted on one side, he has a right to explain all the circumstances of the transaction, though they may make in favour of the case set up by the other party. If his affidavit however had been made in Mr. *Gwyn*'s lifetime, then the charge of usury might have been satisfactorily answered; because Mr. *Gwyn* himself might have made an affidavit that would have removed all imputation of the kind. But even without such an affidavit, and supposing the statement of the bankrupt to be correct, I cannot take upon myself to say, that the charge of 10s. per cent. made by Mr. *Gwyn* was made by him as a shift for usury.

Sir A. PELL.—If this objection on the ground of usury is suffered to prevail, then the whole of the debt, which the petitioner claims to be due to the late Mr,

1832.

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Ex parte
Gwyn.

Gwyn, must be cancelled. Now, on the authority of the case of *Carstairs v. Stein*, I think we are justified in overruling the objection. The Judges in that case, though they might lean the other way, would not disturb the verdict of the jury, who found the charge of 10*s.* per cent. for commission not to be usury. We are here in the situation of a jury, and are bound to decide in the best manner we can upon the fact, as well as the law. Would a jury then be disposed to say, that this charge of 10*s.* per cent. for commission and brokerage, as the bankrupt himself terms it, was usury, merely because the funds advanced by Mr. *Gwyn* were his own monies, and not those of other persons. I can find no case which establishes such a doctrine; nor, even if I did, am I satisfied on the statement in the bankrupt's affidavit, who swears merely to the best of his belief, that such was the fact.

Sir J. Cross.—The debt in this case, amounting to the sum of 370*l.* 17*s.* has been admitted by the bankrupt, on the settlement of an account twelve months after the death of Mr. *Gwyn*; and the bankrupt himself states, that the charge of 10*s.* per cent. was for *commission* and brokerage. Here was a person living in Wales remote from any large commercial town;—he may discount a bill for 10*l.*, and yet it is contended he cannot charge the sum of one shilling for his trouble.

Sir G. Rose.—The only point in this case is, whether the charge of 10*s.* per cent. for commission is referable to trouble and expense, or as a shift for usury; and I am not inclined, under all the circumstances of the case, to adopt the latter construction.

The order was therefore made as prayed.

1834.

Whitmarsh,
May 4.
Amendment of
petition.

ANONYMOUS.

MR. WHITMARSH applied for leave to amend the address of a petition, which by mistake was addressed to the Lord Chancellor, instead of the Judges of the Court of Review. The object of the petition was to supersede a commission, with the consent of the creditors, all of whom had in fact signed the petition.

The order was made accordingly.

Ex parte **SIMPSON**.—In the matter of **WALKER**.

IN this case a commission had been issued against the bankrupt on the 22d January 1834, and a fiat on the 24th February 1834. The commission described him as the son of J. Walker of London, in the county of Middlesex, chamberlain; the fiat described him as a William Walker of Middlesex, in the county of Kent, groom. It appeared that the bankrupt for some years past had gone by various names at various places, having at some age settled in business as a Druggist in Surrey, and after that, under the name of James, afterwards as Peter in Kent; under the name of William Jones and subsequently a Druggist under the name of F. Jones. But he swore that until about 1828 he carried on business as a Druggist in the name of Walker. After the commission issued, and some time after having the meeting for the choice of assignees, the following matter was submitted that

A commission
issued against a
man by the
Court of
Review, under
which name he
carried on his
business at
London.
The name
of the man
was not
known, but
it was known
that he was
a Druggist
in Surrey,
and after that
he carried on
business as a
Druggist in
Kent, under
the name of
James, and
after that
under the
name of Peter,
and after that
under the
name of William
Jones, and
after that
under the
name of F. Jones.
The bankrupt
swore that until
about 1828 he
carried on business
as a Druggist in
the name of Walker.

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Ex parte
SAMBOURNE.

the real name of the bankrupt was *Knox*; but he continued to work the commission against the bankrupt by the name of *Wicks*. The bankrupt had not passed his final examination under the commission, but the commission, as well as the fiat, had been proceeded with to the choice of assignees. The solicitor who issued the fiat made an affidavit, in which he swore that when he issued the fiat, he did not know that the bankrupt had ever gone by the name of *Wicks*, or was the same person against whom the commission was issued. Under these circumstances, the assignees under the commission petitioned to supersede the subsequent fiat.

Mr. *Twiss* and Mr. *Swanston*, for the petition, submitted that the only question in this case was, whether the Court would allow a second fiat to be issued against a bankrupt, before he had passed his last examination under a first fiat, or commission.

Sir G. ROSE.—The assignees under the commission have here the legal title. They have no need to come to this Court, except to relieve themselves from any embarrassment which the fiat subsequently issued may occasion.

Mr. *Wigram*, contra, relied on the cases of *Troughton v. Getley* (a), and *Ex parte Lees* (b). In the first of these an uncertificated bankrupt, having bought his own stock in trade of his assignees, and given security for the payment of the consideration, continued to trade for four years afterwards, contracting fresh debts subsequent to his bankruptcy, and then died; and

(a) Ambl. 630

(b) 16 Ves. 472.

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Ex parte
SANDOZ & CO.

Lord *Camden* held, that the subsequent creditors were to be preferred to the first (a). In *Ex parte Lees* Lord *Eldon* held, that it was not a matter of course to supersede a second commission, but that it rested entirely in the discretion of the great seal; for though the second commission may be void at law, yet in many cases it might be fit to leave those who claimed under it to attempt to maintain it at law; “and if,” he says, “the first commission had been kept on foot fifteen years, with the view of protecting the bankrupt, and enabling him to defraud all those with whom he might deal in subsequent transactions, I should rather supersede the first commission, at the instance of the assignees under the second, than the second at the instance of the assignees under the first.”

Sir G. ROSE.—You cannot show that the first commission is bad, without petitioning to supersede it. The Court must leave the bankrupt's affairs in some mode of administration. It is not enough to say, that they have no right to impeach your fiat; you must not only show that their commission is bad, but apply to have it superseded.

Mr. *Wigram*, in continuation. This Court has an unlimited discretion to act in this matter as it pleases. If the Court is satisfied, that the petitioners must have known that the bankrupt's right name was *Knox*, they are not entitled to continue working a commission

(a) This case, Lord *Eldon* said, was never considered of very high authority; for that unless the bankrupt had purchased the stock with the money of a third person, it was purchased with that which was the property of the assignees; in which case the sale would have been without consideration. *Ex parte Martin*, 15 Ves. 116.

1832.

 Ex parte
 SAMBOURNE.

against him by a wrong name. Now, on the 29th January 1830 the petitioning creditor under the commission was expressly told, that *Knox* was the bankrupt's proper name; in spite of which, however, he proceeded to the choice of assignees. In the case of *Ex parte Schofield* (a), where two commissions issued against a man, the first by a wrong name,—though one he was in the habit of using,—and the second by his right name; Lord *Eldon* ordered the first to be superseded, and the second to stand. If the assignees under the commission had in this case stated on oath, that they did not know the man's real name was *Knox*, then the Court perhaps might have supported the commission. But one of the assignees knew this fact in January 1830; so that they were fully aware that the proceedings under the commission were going on against the bankrupt under a name, by which the whole world might be deceived.

ERSKINE, C. J.—I am not satisfied in this case, that the fiat should be preferred to the commission first issued, the commission being taken out against the bankrupt by the name under which he had previously traded. It is said, that when the assignees were told that his name was formerly *Knox*, they ought to have discontinued their proceedings under the pending commission, and to have taken out another commission against him by that name, for the prevention of fraud. But their debts were contracted with him under the name of *Wicks*; and it appears to me that more fraud would probably have been occasioned, if they had taken out a commission against him by his former name, and not by the name under which he had last traded.

(a) 2 Rose, 246.

1852.


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Ex parte
SANDOURN.

Sir A. PELL.—I am of the same opinion. If an action had been brought by the petitioning creditor against the bankrupt by the name of *Wicks*, he could not have pleaded in abatement. As there is no imputation, therefore, of any trick or connivance practised by the assignees or petitioning creditor in issuing the first commission, I think there is no ground for superseding it. For where there is a valid existing commission in a due course of prosecution, and there is another commission subsequently issued, we ought not to lend our assistance to prefer the last.

Sir J. CROSS.—It does not appear to me, that the bankrupt had any legitimate name whatever. By the name of *P. Wicks* alone was the bankrupt known by any one of the creditors, who have proved debts under the first commission. Then how could any of these creditors have supported a commission against him by his former name?

Sir G. ROSE concurring,

The order was made to supersede the fiat; the costs of both parties to come out of the estate.



Ex parte CHARLES WUCHERER, JOSEPH MILLER, and
JOSEPH CERQUEIRA LIMA.—In the matter of JOSEPH
VANZELLER.

1832.

Westminster,
May 7.

THE bankrupt in this case had for many years carried on business as a merchant in London on his separate account, and also at Bahia in the Brazils in partnership with *Anthony Armando* and *Paulin Manbossin*, under the firm of *Joseph Vanzeller & Co.*; and it appeared, that the bankrupt kept a separate account of all his dealings relating to this firm at the Brazils. On the 2d September 1830 the bankrupt stopped payment, at which time there was a cash balance of 600*l.* due by him to the firm of *Joseph Vanzeller & Co.* at the Brazils; but he was then under acceptances on account of that firm to the amount of 11,000*l.*, none of which however were then due, nor was any one of them ever paid by the bankrupt. After the bankrupt suspended his payments, a meeting of his creditors was convened; when it was agreed, that in order to avoid a bankruptcy, he should be at liberty to liquidate the assets of his house in England, under the direction of four of his creditors, as inspectors of his estate; and that the several remittances which were then expected from the Brazillian house should be allowed to come to hand, without prejudice to the rights of that firm, and when received, should be placed in the names of the inspectors on a deposit account, distinct and separate from the bankrupt's general funds; and that the inspectors

A., trading in London on his separate account, and at Brazil in partnership with *B.* and *C.*, under the firm of *A. and Co.*, becomes insolvent, when four of his creditors are appointed inspectors of his estates, who, it was agreed, should receive the several consignments and remittances expected from the Brazil house, as trustees for the persons to whom the same might be ultimately found to belong. The Brazil house, ignorant of *A.*'s insolvency, make various consignments to *A.*, directing him to sell them at certain places abroad, and the proceeds to be placed to the account of the Brazillian house. These goods are accordingly sold under the direction of the inspectors, and the proceeds received by them. At the time of *A.*'s insolvency, he was under acceptances to the Brazillian house to a larger amount than the value of the consignments, but such acceptances were on a general account, and not on the account of any particular consignment from the foreign house. *A.* afterwards becomes bankrupt, and a cession of the effects of the Brazillian house is also made to assignees, according to the laws of Brazil. Held, that the assignees of the Brazillian house, and not the assignees of *A.* in England, were entitled to the proceeds of these goods.

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and others.

should hold the same as trustees for the persons to whom the same might be ultimately found to belong, whether to the Brazillian firm, or to the bankrupt's separate house of trade in England. On the very day on which the bankrupt stopped payment, viz. the 2d. September 1830, the Brazillian house shipped from Bahia 3000 hides, which they consigned to the bankrupt, and directed to be sold at Havre, and the net proceeds to be remitted to the bankrupt in London on account of the Brazillian house. On the 14th and 20th September the Brazillian house consigned 1000 more hides, 102 cases of sugar, and 57 bags of cotton, to the bankrupt, with directions that the same should be sold at Genoa, and the net proceeds thereof remitted to the bankrupt in London on account of the Brazillian house; and on the 28th September 1830, the Brazillian house, still in ignorance of the bankrupt's insolvency, consigned 95 cases of sugar to him, with directions for the same to be sold at Trieste, and the proceeds to be remitted to the bankrupt in the same manner as those of the two previous consignments. On the 10th August 1830 the Brazillian house had also remitted to the bankrupt a bill for 91*l.* 18*s.* 3*d.*, and on the 28th September 1830 another bill for 22*l.* 1*s.* 10*d.*, directing him to place both bills to their credit. The net proceeds of the several consignments of goods above mentioned, as well as these two bills of exchange, came to the hands of the inspectors before the 1st December 1830; and after deducting incidental charges and expenses, there remained in their hands a clear balance of 2991*l.* 14*s.* 10*d.*, which sum was never in the possession of the bankrupt.

On the 18th July 1831 the bankrupt, being unable to fulfil the conditions he had entered into with his

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WUCHERER
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creditors for the liquidation of their debts, filed a declaration of insolvency in the Bankrupt Office; and on the 29th July following a commission of bankrupt was issued against him, under which he was duly adjudged bankrupt, and assignees were chosen of his estate and effects. On the 1st December 1830 a cession of the estate and effects of the Brazillian house, according to the law of Brazil, was made by the bankrupt's two partners in the foreign firm; and by the same law, the petitioners were duly appointed assignees of the estate and effects of the Brazillian house.

On the choice of assignees of the bankrupt in England, it was arranged between them and the agent of the petitioners, that, without prejudice to the rights of either party, the before-mentioned sum of 2991*l.* 14*s.* 10*d.* should be received by the assignees under the English commission, who should hold the same as trustees for the persons to whom that sum might belong, on a distinct and separate account; and the assignees having accordingly accepted that sum, it was contended, that they held the money upon the same trusts as the inspectors had previously held the same.

The several acceptances of the bankrupt, to the amount of 11,000*l.*, on account of the Brazillian house, which were outstanding on the 2d September 1830, had been proved or claimed under the bankrupt's commission, and had also been charged against the estate of the Brazillian firm, as the drawers thereof, under the cession, according to the laws of Brazil. The petitioners, on behalf of the creditors of the Brazillian house, applied to the assignees under the English commission for the said sum of 2991*l.* 14*s.* 10*d.*; on the ground that this sum was part of the joint estate of the Brazillian house, and should be administered for the

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and others.

benefit of the creditors of that firm; but the assignees claimed this sum for the benefit of the creditors who had proved under the commission in England.

Under these circumstances, the petitioners prayed that the assignees under the separate commission issued against the bankrupt in England might be ordered to pay to the petitioners, for the benefit of the creditors of the Brazillian firm, and as part of the assets of that firm, the said sum of 2991*l.* 14*s.* 10*d.*, as well as the costs of the petition.

Mr. *Swanston* and Mr. *G. Richards*, in support of the petition, contended, that the goods consigned to the bankrupt by the Brazillian house had been, in effect, stopped *in transitu*; as the goods had never, in fact, come to the bankrupt's possession. In the case of *Patten v. Thompson* (a) it was decided, that the unpaid vendor might stop goods *in transitu*, before they came to the hands of the vendee's factor; although the factor had in his hands the bill of lading indorsed to order, and was under acceptances to the vendee on a general account. Now the acceptances in this case being made by the bankrupt, not on account of any particular consignment of goods, but on a general account, will not prevent the right of stoppage by the house in the Brazils. Lord *Ellenborough*, in his judgment in the case cited, draws expressly that distinction. He says, "if there had been any specific pledge of this cargo in the course of the transaction—if bills had been accepted by the Liverpool house on the credit of this particular consignment—or if it had been so stipulated, this would have been a different case." [*Erskine*, C. J. The same distinction was taken by Lord *Ellenborough*

(a) 5 M. & S. 350.

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in *Vertue v. Jewell* (a), where he decided that the property in a cargo, consigned on account of a particular balance owing by the consignor to the consignee, vested absolutely in the consignee from the moment of the shipment, and that the consignor had no right to stop it *in transitu*.] The cases of *Kinloch v. Craig* (b), and *Clay v. Harrison* (c), show, that unless the goods consigned come into the actual possession of the consignee, the consignor may stop them *in transitu*, although the consignee may be under acceptances in favour of the consignor. And in this case the goods never came to the hands of the bankrupt, but were taken possession of by the inspectors, who must be considered as trustees for the parties entitled to them.

Mr. Koe and Mr. Sharp, for the assignees under the commission, did not dispute the law upon the subject, but differed as to the inference to be drawn from the facts of the case. The bankrupt accepted the bills, as a separate trader, in favour of the house at the Brazils; and the latter consigned goods to him, which we contend came to his possession, and therefore determined the *transitus*. It makes no difference, that the bankrupt was a partner in the house at the Brazils; he must be considered, to all intents and purposes, as a separate trader. The sum of 11,000*l.*, the amount of his acceptances in favour of the foreign house, included the value of the goods consigned. When the house abroad bought goods to be consigned to London, they did not pay for the goods, but gave bills drawn by them on the bankrupt in London. That is the general mode of dealing by merchants in the Brazils, whether

(a) 4 Camp. 31.

(b) 3 T. R. 119.

(c) 10 B. & C. 99.

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WUCHERER
and others.

the person on whom they draw in this country is, or is not, a partner in the foreign house. [Sir G. Rose. The fact here is, that the goods were not sold by the house abroad to the bankrupt, but were merely consigned to him to be sold as their *agent*. The point of stoppage *in transitu* only applies to the case of vendor and vendee. Here, if there is any claim, it is in the nature of an equitable lien on the funds. *Erskine, C.J.* It would have been different, also, if the goods had been sold by the bankrupt, and the proceeds mixed up with his general effects; but here they have been kept entirely separate.] The transaction was in the nature of a sale to the bankrupt; for the foreign house having drawn generally on the bankrupt, he must be treated as the vendee. The acceptances have been proved against the bankrupt's estate; and the bankrupt, if not to be considered as the vendee of these goods, ought at any rate to be considered in the nature of a factor under general acceptances for his principal, and having a lien on the proceeds of these goods for his general balance.

ERSKINE, C.J.—There are two different modes of looking at the character of *Vanzeller* in this case, namely, either as vendee, or as agent. If he had been the vendee of the goods, the case might have warranted our coming to the conclusion contended for by the assignees. But even then he must have made out, that he was under acceptances for these specific goods, which were consigned to him by the house abroad. Now what are the facts of the case? The acceptances given by the bankrupt were not for these specific goods, but on a general drawing account between the foreign house and himself. The goods

were not sold by the bankrupt, but by the inspectors, as trustees for all parties concerned; the proceeds have been kept separate from the bankrupt's general effects, and must be therefore dealt with as the goods themselves would have been, if they had remained in specie. And as the goods were consigned to the bankrupt on account of the Brazillian house, so I think the proceeds must be held to belong to the creditors of that house, and not to the separate creditors of the bankrupt in England.

1832.

Ex parte
WUCHERER
and others.

Sir A. PELL.—It appears, that the bankrupt stopped payment on the 2d September 1830, upon which it was agreed by his creditors, that the goods expected from Brazil should be placed in the hands of the inspectors, and the proceeds retained by them as trustees for the persons who might be ultimately entitled to them. I consider, that the house abroad have the same right to these goods, as if they had never left the Brazils; for it is clear, that the acceptances entered into by the bankrupt were never given specifically for any parcel of these goods.

Sir J. CROSS and Sir G. ROSE concurred.

Order made as prayed; the costs of all parties to be paid out of the fund in the hands of the assignees.

1832.

*Westminster,
May 7.*

The assignees are bound to furnish a creditor, who has proved, with a copy of their accounts, if he offers to pay the expense of making such copy.

Ex parte ADAM ABERDEEN, ALEXANDER GRAHAM, and JOSEPH TOOGOOD.—In the matter of HOWARD and GIBBS.

THIS was a petition of three creditors of the bankrupts, praying that they might, at their own expense, have a copy of all the accounts of the receipts and payments by the assignees, and that the assignees might pay the costs of the application. The commission issued on the 22d August 1821. On the 31st August 1831 the petitioners applied to the assignees for a copy of the accounts, to be furnished them within a month, or such other reasonable time as the assignees might fix for that purpose, undertaking to pay them for such copy. To this application the assignees answered, that their accounts had been audited and allowed by the Commissioners, and were filed with the proceedings under the commission; and offered to produce for the inspection of the petitioners, at any time convenient to them, the books containing every receipt and every payment under the commission, and also the bankers' books, and the accounts audited by the Commissioners, and filed with the proceedings. The assignees also expressed their readiness to attend any appointment which the petitioners might make, for the purpose of affording any explanation that the creditors required; but the assignees declined furnishing any copy of the accounts. It appeared, that dividends to the amount of 16s. 6d. in the pound had been paid under the commission, and that the unpaid portion of the debt of one of the petitioners was only 2l. 6s. 8d., of another 19l. 19s., and of the other 190l. 15s. The petitioners made a second application to the assignees, offering to deposit in their

1837.

*Ex parte
Anderson
and others.*

hands any sum of money they might require for the expense of a copy of the accounts, and to procure a proper person to make the copy, and to attend for that purpose at such times and places as the assignees might appoint. But the assignees referred to their former answer, declining to permit a copy to be taken, but offering an inspection.

Mr. Montagu appeared in support of the petition.

Mr. Swanston contra. The assignees have no wish to withhold from the petitioners any information as to the accounts; but the mode in which the petitioners seek to obtain it is very inconvenient, and quite unauthorized in practice. Out of 80,000*l.*, the amount of the debts proved under the commission, not more than 212*l.* was due to these petitioners. By the 101st section of the Bankrupt Act (*a*), which directs the assignees to keep an account of the bankrupt's estate, it is provided, that every creditor who has proved may inspect this account at all seasonable times; but not a word is said about furnishing the creditor with a copy of the account. And accordingly when this very point occurred before the Vice-Chancellor, in *Ex parte Granger* (*b*), he decided that a creditor was not entitled to have copies of the assignees' accounts delivered to him; and that if he was denied his right of inspection, an application should be made by him to the Commissioners, who might compel the assignees to produce their accounts for his inspection. Now in this case there was no application made by the petitioners for an inspection of the accounts, nor was there any

(*a*) 6 *Geo.* 4. c. 16.

(*b*) *Mont. & M.* 289.

1832.

Ex parte
Ashebridge
and others.

refusal by the assignees to permit such inspection; but, on the contrary, there was an express offer made by the assignees to the petitioners of permission to inspect the accounts. There has been already a dividend of 16s. 6d. in the pound paid under this commission. The amount of the dividend, therefore, which these petitioners have received, does not infer any great misconduct of the assignees in the management of the bankrupt's estate. If this Court should overrule the decision of the Vice-Chancellor, there would be the expense of an appeal to decide between two Courts of co-ordinate jurisdiction.

ERSKINE, C. J.—This is a question purely for the discretion of the Court; and I must own it appears to me not unreasonable, that a creditor should be furnished with a copy of the assignees' account, if he is willing to pay the expense of such copy. The expense incurred by the creditor, on an occasion of this kind, will be quite enough to prevent parties from making unnecessary applications to the assignees. The order will therefore be, that the assignees do furnish the petitioners with a copy of these accounts, at the expense of the petitioners; the petitioners paying their own costs of this petition, and the assignees to be paid their costs out of the estate.

Sir A. PELL.—This point, in justice and reason, is as clear as the sun at noon-day. Nor do I think it in any way inconsistent with the terms of the 101st section, that we should order a creditor, who has proved under the commission, a copy of the assignees' accounts, when he offers to pay for it.

Sir J. Cross.—I am glad that a case of this description has been brought before the Court, because, in the course of my experience, I have known great injustice done by the assignees refusing to let any creditor have a copy of their accounts. Suppose one of the creditors under a London commission to reside in Yorkshire, and another in Cornwall, and they both apply to the assignees for a copy of the accounts,—and the assignees say, no, we shall not give you a copy, but you may if you please inspect the accounts;—what use would this permission be of to creditors, who live at such a distance from the place where the commission is working? I think it quite reasonable, therefore, that they should be furnished with copies, at their expense; on the same principle, as overseers of a parish are bound to give copies of their accounts to any person assessed there to the poor's rate, on his paying for the expense of making them (a).

1892.

Ex parte
ABERDEEN
and others.

Sir G. Rose concurred.

(a) See 17 Geo. 2. c. 38. s. 1.



Ex parte BELLWOOD.—In the matter of COCKERELL.

Westminster,
June 4.

THIS was a petition by the assignees to supersede a commission, on the ground of its being fraudulently concerted between the petitioning creditor and the bankrupt, and also on the ground of there being no valid petitioning creditor's debt, or act of bankruptcy. The bankrupt had made an affidavit in support of the

On a petition by assignees to supersede a commission, the bankrupt's affidavit is admissible, to show that the commission was fraudulently concerted.

1862.

Ex parte
Bellwood.

petition, in which he swore that *Nowlett*, the petitioning creditor, who was also the solicitor that issued the commission, suggested that *Cockerell* had better be made a bankrupt; and upon his saying, that he was not indebted to any one in a sufficient amount, *Nowlett* said, it might be contrived; that he then produced a promissory note to the requisite amount for the bankrupt to sign, and told him he must leave his house to commit an act of bankruptcy.

Mr. Montagu appeared in support of the petition.

Mr. Swanston and *Mr. Bacon*, for the petitioning creditor, took a preliminary objection to the reception of the bankrupt's affidavit, which they contended was inadmissible in evidence. It is a rule universally adopted by the courts of law, that a bankrupt is not a competent witness to support or defeat his commission; and there is no distinction between a court of equity, and a court of common law, in this respect. [*Erskine*, C. J. Has it not been the constant practice for the Lord Chancellor, when he directed an issue, to order the bankrupt to be examined? Or, have you any case, in which the Chancellor ever rejected such an affidavit as this?] Upon the trial of an issue, though the Lord Chancellor may have directed the bankrupt to be examined, it would still be competent to a party to object to his evidence being received, if he was an inadmissible witness in point of law; for where a court of equity directs a party to the suit to be examined on the trial as a witness, such an order waives no objection, except that which arises from the circumstance of the witness being

1882.

Ex parte
BELLWOOD.

a party in the cause; *Rogerson v. Whittington* (a). It removes, therefore, no objection on the ground of interest. The proceeding by affidavit is an anomaly in the law of evidence; for though the courts admit an affidavit of a party interested to be read in an interlocutory proceeding, yet when the main point in issue is to be finally decided, then neither a court of law, nor a court of equity, receives any affidavit as evidence on which to found its decision. Upon the trial of an issue, therefore, the affidavits on which it was granted become useless. But the courts have never proceeded by a double anomaly; they have been content with the single anomaly. There have been exceptions, it is admitted, in lunacy and bankruptcy; but this tribunal is not obliged to follow the errors of its predecessors, but should be guided by the strict rules of law.

Sir A. PELL.—Suppose a commission to be issued against a man, who petitions to supersede it, alleging that he has not committed an act of bankruptcy. What is to be done in that proceeding? Must not the bankrupt make an affidavit in support of the allegation in his petition? And is not his affidavit receivable by the Court, which determines the question of granting a supersedeas? And yet you would say in that case, that the bankrupt being an interested party, his affidavit could not be read.

Mr. Swanston. There I admit the affidavit would be properly receivable by the Court, for the purpose of deciding whether it would institute an inquiry; but the only effect of the affidavit in that case is to give the

(a) 1 Swanst. 39.

1832.

Ex parte
Buzzwood.

bankrupt a *locus standi in curia*. A court of equity does not give credit to an affidavit, as evidence, on a bill for a discovery, but requires it merely by way of precaution, before it puts its machinery into motion in favour of the plaintiff. An affidavit indeed is not receivable in any Court, except in an initiatory proceeding. Whatever may have been the course of proceeding heretofore on petitions in bankruptcy, this Court being a court of law, as well as a court of equity, must be guided by the common rules of evidence adopted by courts of law; nor is there any thing contained in the act establishing this Court, which renders it imperative on the Court to dispense with any of these rules.

Mr. Montagu. When all the property of a trader is, upon the issuing of a commission against him, seized by the process of this Court, is it to be endured, that a man, thus ruined by an *ex parte* proceeding against him, is not to be permitted to make an affidavit to explain his conduct, and show that he has committed no act of bankruptcy?

ERSKINE, C. J.—It seems to me, that there is no force whatever in the objection made to the reception of the bankrupt's affidavit. Upon a motion for a new trial even in a court of law, the affidavits of the parties in the cause are always received, and it is more or less upon the statements contained in them, that the Court decides whether it will grant a new trial or not. But it has been the constant practice in bankruptcy to receive the affidavits of the parties interested, who would clearly be not witnesses upon the trial of an action in a court of law. And notwithstanding all that

has been urged on this subject, I cannot see why a different practice should now prevail.

1832.

Ex parte
BELLWOOD.

Sir A. PELL. — I shall always be most happy to concur in any measure that may be proposed, to do away with the former abuses that have prevailed in proceedings in bankruptcy. But we are now called upon to do, what neither the Lord Chancellor, nor Vice-Chancellor, have been applied to to do before. Bankruptcy is a branch of the law of a peculiar description; and I should say, that the evidence on a proceeding to supersede a commission may be of the same description, as where a party petitions for a commission. Is not a commission issued on the affidavit of the petitioning creditor? Then why should not the affidavit of the bankrupt be receivable, when he petitions to supersede the commission? I confess, I do not understand the distinction that has been taken between an initiatory proceeding and a final one, as to the admissibility of evidence. Upon an application against an attorney in a court of law, the Court is always accustomed to deal with it on affidavit; though, if they think the party ought to be examined, they will order him to be examined upon interrogatories. The cases, too, which occur on summary applications to courts of law under the annuity act, are as like this as can well be. For near 300 years affidavits of this description have been constantly received in proceedings in bankruptcy, and no sufficient reason has been stated to my mind, why we should alter the practice.

Sir J. CROSS.—This is avowedly a new experiment, which seems to be tried upon this ground,—namely,

1892.

Ex parte
Dallwood.

that as this Court is in its constitution both a court of law and equity, it is bound to adhere to the rules of evidence adopted by courts of law. But it is not a fair mode of reasoning, to adduce those rules in support of the present argument. What is the proceeding here? The assignees of the bankrupt in this case petition to supersede the commission, alleging that its process has been obtained by fraud. Now, would not an affidavit of a party be receivable even in a court of law, upon a motion to set aside a judgment which is charged to have been obtained by fraud? It appears to me, there is no ground whatever for this objection.

Sir G. Rose concurring,

The case was then argued on the facts, as stated in the different affidavits, which were very conflicting; but the Court finally ordered the commission to be superseded, at the costs of the petitioning creditor.

Westminster,
June 4.

Where notice is given to the respondent of a motion for leave to amend the petition, and such permission is granted after the respondent appears to oppose it, the respondent will not be entitled to the costs of the day.

Ex parte GREEN.—In the matter of RIDLEY.

MR. MONTAGU in this case applied for permission to amend the prayer of a petition for a *proceedendo*, which had omitted to pray for the costs, by inserting the necessary words for that purpose. Notice of the application had been given to the parties on the other side.

Mr. Kinderley, who appeared for one of the respon-


1832.

Ex parte
GREEN.

dents, opposed the application. The petition was in the paper of the day for hearing, and the petitioner ought to have known his own case when he framed his petition. The respondents have already filed their affidavits in answer to the allegations of the petition; and if the prayer is altered by praying costs against them, they will be obliged to file fresh affidavits, and be put to unnecessary expense. The petition was originally set down for hearing on the 3d April; and after all this delay, when the petition is about being called on, and the case is ripe for hearing, the petitioner wants to extend the prayer of his petition. At all events, if this permission is granted, it must be upon payment of the costs of the day.

ERSKINE, C. J.—If the petitioner had not given previous notice of his intention to make this application, I should have thought that the respondents were entitled to the costs of the day. But as one of them has appeared to oppose this motion, which appears to us not unreasonable to be granted, the costs of the opposition must be paid by him. If the amendment, however, occasions any consequential expense to the respondents, those costs, I think, they are properly entitled to.

Sir J. Cross referred to the common practice of amending a record at the assizes, notwithstanding the cause was set down in the cause paper.



1832.

Westminster,
June 4 and 5.

Where the bankrupt's certificate has been stayed at the instance of creditors, who afterwards withdraw their opposition to it, and appear by counsel to consent to its allowance, the Court will allow the certificate, without the usual explanatory affidavit.

In the matter of HALL.

THIS was a petition to allow the bankrupt's certificate, which had been stayed at the instance of three mortgagees, by an order of the Vice-Chancellor, until they could prove the amount of their debts. They had, however, been since duly satisfied their several debts, and consented to withdraw their opposition to it.

Mr. Sturgeson, in support of the petition, said, that this was not like the case of withdrawing a petition to stay the certificate; in which case the creditor was obliged to make an affidavit that he had received no consideration from the bankrupt for withdrawing the petition; *Ex parte Gibson*, &c. But here the order to stay the certificate has been already made, which the opposing creditors consented to abandon, having been satisfied their debts from the securities they held.

ESKINE, C. J.—Still, has it not been usual in such a case to have an affidavit of the creditor, that he does not abandon the order by reason of any pecuniary arrangement with the bankrupt?

Mr. Sturgeson. Not where the creditor has been already before the Court, and the merits of his petition have been discussed, and an order made upon the hearing of it. Such a case as this does not fall within the rule laid down by Lord Eldon in *Ex parte Gibson*.

The Court were disposed to think it came within the

principle of the rule, and desired the case to be mentioned again on the following day; but

1832.

In re
HALL.

Mr. *Montagu* then appearing on behalf of the creditors, and consenting to the application,

June 5.

The order was made for the allowance of the certificate.

Ex parte WILLIAM MORLEY and JAMES MORLEY.—In the matter of RICHARD GOVETT and JOHN LEIGH.

Westminster,
June 8 and 9.

THE petitioners in this case had proved under the commission as separate creditors of the bankrupt *Leigh*; and they now petitioned for an order to expunge the proof of one *Thomas Sherlock* made against *Leigh's* separate estate, and to stay the dividends payable to the creditors of the estate, under the following circumstances.

It is no objection to the proof of a debt under a third commission, that the creditor might have proved it under the second commission, under which the bankrupt has obtained his certificate, if the bankrupt has not paid 16s. in the pound under the second commission.

The commission, under which this proof was made, issued against *Govett* and *Leigh* on the 11th September 1823. But it appeared, that no less than four previous commissions of bankrupt had been issued against *Leigh*; one on the 19th July 1803, another on the 17th August 1811, another on the 15th September 1815, and another on the 28th October 1820, under all which he had obtained his certificate; though no dividend had been ever paid to the creditors under any of these four previous commissions. The proof made by *Sherlock* under the present commission was for 700*l.* 18*s.* upon four several bills of exchange, the

1832.

Ex parte
MORLEY
and another.

consideration for which, as stated in the petition, was for goods sold and delivered, and monies lent and advanced, by him to *Leigh*, previous to or about the year 1814. The petitioners, being advised that the debt was barred by the statute of limitations, and that the proof could not in other respects be sustained, applied to the Commissioners to expunge it; but the Commissioners, after an investigation into the circumstances under which the debt was contracted, declined to expunge the proof. In March 1830, a dividend of 4s. 6d. in the pound was declared under *Leigh's* separate estate, and there were other funds distributable among his separate creditors.

Leigh the bankrupt stated in an explanatory affidavit, that in the years 1814 and 1815 he was indebted to *Sherlock* in 404*l.* and upwards, on the balance of accounts for goods bought by him of *Sherlock*; and that in 1815 a commission (one of those already mentioned) issued against him, under which he obtained his certificate; but *Sherlock* did not prove his debt under that commission. That in the year 1819 *Leigh* had occasion to go to Ireland, when *Sherlock* threatened immediate proceedings against him, if he did not arrange the payment of this debt; when *Leigh*, finding the certificate obtained under his bankruptcy in England would be no protection against Irish creditors, and through fear of being deprived of his liberty, was induced to give *Sherlock* the bills in question, namely, an acceptance dated the 12th April 1819, payable at 12 months, for 160*l.*; and three others dated respectively the 23d March 1819, one payable at two years for 100*l.*, another payable at three years for 160*l.*, and another payable four years after date for 158*l.*, making together the sum of 638*l.* 12*s.* That *Sherlock*

did not prove any debt under the subsequent commission issued against *Leigh* in 1820; but when *Leigh* was confined in the Fleet prison for debt, *Sherlock* caused a detainer to be lodged against him for 160*l.*, the amount of the first mentioned bill of exchange which had then become due; at which time *Leigh* had not obtained his certificate under the commission in 1820, but he obtained it early in 1821; previous to which, however, he was discharged by an order of the Court for Relief of Insolvent Debtors.

1832.

Ex parte
Moulet
and another.

Mr. *Twiss* and Mr. *Keene*, for the petitioner. The debt of *Sherlock* was barred by the statute of limitations, or by the certificate obtained by the bankrupt *Leigh*, under one or other of the two separate commissions, which issued against him in the years 1815 and 1820. Or if the debt be not so barred, *Sherlock* had no right to prove these bills of exchange under this commission, but ought to have made them available under some one of the former commissions. For it would be unjust towards the creditors under the commission now in prosecution, that when *Sherlock* could have proved these bills under one of the former commissions, he should be permitted to lie by and help himself to funds, which are properly divisible amongst those creditors, whose debts were contracted with the bankrupt in the interval between the last commission and the issuing of the present one. The consideration for *Sherlock's* debt appears to have been goods sold and money lent by him to the bankrupt about the year 1814, which was nine years before the issuing of the present commission. He should therefore have proved his debt under the commission which issued in 1815, or the subsequent

1832.

Ex parte
MORLEY
and another.

one in 1820; for, under the old law of bankruptcy, as it existed previous to the 6th Geo. 4. c. 16, a third commission vested all the bankrupt's estate in the assignees, notwithstanding he had not paid 15s. in the pound under a second commission; *Hovill v. Browning* (a). By his own laches, merely, was *Sherlock* prevented from proving his original debt under the third commission. And as to the bills, we contend they were obtained illegally, having been given by him under duress; but, at any rate, he might have proved the amount of them under the fourth commission. For, if the third commission was valid, the fourth would be valid also, having been issued before the 6 Geo. 4. c. 16.

Mr. Swanston, for the respondents, cited the case of *Ex parte Buckle* (b), where creditors, who had obtained an order to prove under a second commission, under which 15s. in the pound was not paid, were held to be entitled to prove their debts under a third commission.

ERSKINE, C. J.—This appears to me a very clear case. The bills were given by the bankrupt to *Sherlock* in 1819; the commission under which *Sherlock* proved them issued in 1823; the statute of limitations, therefore, does not apply. It is quite clear, from the case of *Hovil v. Browning*, that the original debt was not barred, as the bankrupt had not paid 15s. in the pound under any of the former commissions. If a case of duress had been made out against *Sherlock*, then indeed he could not have proved for these bills. But here there was none; the creditor, according to the bank-

(a) 7 East, 154.

(b) 1 G. & J. 32.

1832.

Ex parte
MORLEY
and another.

rupt's own showing, having only threatened legal proceedings against him, if he did not make some arrangement for the payment of the debt, which the creditor had a perfect right to do. But it is said, that although we may think the proof on the bills ought not to be expunged, yet we should make an order for the payment of the dividends to be postponed. But the creditor could have sued the bankrupt at law on the bills, and have taken out execution against him; nor would a Court of Equity have prevented him from doing so. I think, therefore, that we should not be justified in depriving a creditor of a legal right, because the enforcing it may be a hardship on the other creditors.

Sir A. PELL.—The original debt in this case was contracted since the two first commissions against the bankrupt, and previous to the third; and the question is, whether his certificate obtained under the third commission does not discharge the debt. I had at first a doubt in my mind on this subject; but I do not think, that it should prevent my concurring in the judgment of the rest of the Court. With respect to the operation of the statute of limitations,—the debt, which was contracted in 1814, would of course be barred by that statute in 1823, if it had not been for the bills given by the bankrupt in 1819. But those bills created a new debt, which is therefore not affected by the provisions of that statute.

Sir J. CROSS.—This is an application to expunge the proof of a debt for 700*l.* admitted eight years ago; and it appears to me, that the petitioners have laid no

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Ex parte
MORLEY
and another.

foundation whatever for our granting such an application.

Sir G. ROSE also concurred.

Petition dismissed with costs.

SECOND CASE.

Ex parte MORLEY.—In the matter of GOVETT and LEIGH.

Westminster,
June 9.

A bankrupt, previous to his bankruptcy, gave a bond to trustees for the payment of 5000*l.* and interest, as a provision for his daughter on her marriage. The trustees having proved the amount under the commission, a petition was presented to expunge the proof, the bankrupt alleging that when the bond was given it was understood between him and the obligees, that it was only to be available in the event of the success of a certain speculation:—Held, that such parol evidence was not admissible to control the absolute effect of the bond.

THIS was a second petition of the same parties, praying for an order to expunge another proof made in the same bankruptcy, against the separate estate of *Leigh*, which had been admitted under the following circumstances.

The bankrupt, *John Leigh*, on the 31st December 1821, previous to the marriage of his daughter *Mary Ann Sophia Leigh* with *Joseph William Furlong*, entered into a bond to *John Smith Furlong*, *Thomas Cloughton*, and *Thomas Leigh*, conditioned for the payment to them of the sum of 5000*l.* and interest on the 15th January then next, upon certain trusts for the benefit of the said *Joseph William Furlong* and *Mary Ann Sophia Leigh*, and the issue of their intended marriage. The commission, under which the proof was made, issued on the 11th September 1823, when *John Smith Furlong*, on behalf of himself and his co-trustees, proved the sum of 5435*l.* for principal and interest due on the bond.

The petitioners alleged, that before the marriage of *Joseph William Furlong* with the daughter of *Leigh*,

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Ex parte
Morley.

he had entered into partnership with *Leigh* in some extensive speculation to the Cape of Good Hope; and that it was agreed between them, that the money secured by the bond should be paid out of the produce of that speculation, and that the bond was only to be available in the event of the speculation realizing sufficient to pay the same. The speculation, however, was not proceeded with, but a vessel called the *Sir Godfrey Webster* was purchased by the bankrupt *Leigh*, and fitted out for the intended voyage at an expense of 5000*l.* and upwards, as part of his share of the capital of the partnership, and transferred by him to *J. W. Furlong*; which vessel with the outfit was afterwards sold by *J. W. Furlong*, without the authority of *Leigh*; *Furlong* receiving the proceeds and applying the same to his own use. The petitioners asserted, that as the speculation was not proceeded with, it was never intended that the bond should be acted upon or enforced; and that neither *Claughton* nor *T. Leigh* executed the articles referred to in the bond, or in any manner interfered in the trusts thereof, and that *J. S. Furlong* did not execute the articles until after the present commission issued against *Leigh*. That a bond of the same amount was at the same time given by *J. W. Furlong* to *J. S. Furlong*, *T. Claughton*, and *T. Leigh*; but that such last-mentioned bond had never been enforced against *J. W. Furlong*, by reason of the speculation to the Cape of Good Hope being abandoned. That when the bond was given by *Leigh*, he had only a few months previously obtained his certificate under a former commission; and that shortly after the date of the bond he became embarrassed in his circumstances, and in the April following was arrested for

1832.
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Ex parte
MORLEY.

debt, and surrendered to the King's Bench prison; and that on the 2d July in the same year a fresh commission of bankrupt issued against him, under which he was duly found a bankrupt. That an application had been made to the Commissioners to expunge the proof upon the usual undertaking; and a private meeting being held by them on the 7th November 1831 to investigate such proof, at which *Leigh* was examined upon oath, one of the Commissioners decided that the proof ought to be expunged, another thought the contrary, and the third declined to give any opinion.

The petition then went on to state, that in the month of February last the assignees preferred a petition to this Court, stating (amongst other things) that on the 16th March 1830 a dividend of 4s. 6d. in the pound had been declared on the separate estate of *Leigh*, and stating also that four previous separate commissions had issued against *Leigh* in the years 1811, 1813, 1815, and 1820, under neither of which had any dividend been declared, though *Leigh* had obtained his certificate under every one of these four commissions; and stating, further, the payment by the assignees into the Bank in the name of the Accountant-General of the sum of 1705*l.*, that being the gross amount of the dividend declared under the separate estate of *Leigh*; and that this sum was laid out in the purchase of 1860*l.* 17s. 3 per cent. consols; which the petitioners prayed might be sold, and the proceeds paid to the assignees. That petition came on to be heard on the 17th February last, when the Court made an order as prayed.

The prayer of the present petition was, that the proof of *J. S. Furlong* for 5435*l.* might be expunged,

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that the costs of the petitioners might be paid out of *Leigh's* separate estate, and that in the mean time the dividend so declared under that estate might be stayed.

The facts stated in this petition were supported by the affidavit of Mr. *Knight*, a solicitor, who swore that Mr. *Morrison*, one of the assignees, informed him that *Leigh* never recognized this debt, nor in any manner alluded to it on passing his last examination; and that *Morrison* invariably protested against the right of *J. S. Furlong* to prove such debt. That the proof was admitted by *Davies*, the other assignee, without the concurrence or knowledge of *Morrison*, who complained to the Commissioners on the subject; that *Davies* was upon intimate terms with *J. W. Furlong*, and that *Morrison* had no doubt that his co-assignee connived at the admission of the proof. Mr. *Knight* further swore, that no steps whatever had been taken to investigate the circumstances, or to call upon *J. W. Furlong* to account for the proceeds of the vessel and the stores so sold by him.

In answer to these allegations, *J. W. Furlong* made an affidavit, in which he deposed as follows:—That the bond in question was given by *Leigh*, with a warrant of attorney, on the occasion of the deponent marrying *Leigh's* daughter, as her marriage portion, and was accordingly vested in the trustees of the marriage settlement for the benefit of the daughter and her issue; but the deponent positively denied that it was given with the understanding alleged in the petition, or that there was in fact any understanding whereby the effect of the bond could be varied or rendered conditional or nugatory; except an arrangement, by way of further or collateral security, that the profits to arise to *Leigh*,

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by reason of an intended partnership between him and the deponent, but which never took effect, should be applied in payment of the bond. That in consideration of this marriage portion, the deponent's father was induced to enter into a covenant with the trustees, to secure to the deponent a certain proportion of his property payable at his decease. That he believed the ship called the *Sir Godfrey Webster* was not purchased or fitted out by *Leigh*, but was purchased by *Thomas Claughton*, one of the trustees, or by *Leigh* as his agent; and was by him sold to the deponent, and the fitting out of the vessel was paid for by the deponent alone; and that *Leigh* had never any property or interest in the ship; but that if the intended partnership had taken effect, it was intended to have given him a certain share or interest therein. That at the time of these transactions deponent believed *Leigh* to be a person of very considerable property, having never been informed of his previous bankruptcies; and that in confirmation of the deponent's belief in the ability of *Leigh* to fulfil the undertaking entered into by him with the deponent,—when *Leigh* offered to pay the amount of the bond to the trustees, but alleged that he could make much better interest of the money in his trade, if the same was not locked up,—the money was not insisted upon; and the deponent still believed that if all *Leigh*'s accounts had been properly made out, he would appear to have been then perfectly solvent. That so far from *Leigh* not recognizing the debt, as stated in Mr. *Knight*'s affidavit, he advised the deponent by letter, that a proof for the 5000*l.* should be forthwith made on his estate. That so far from the deponent being on intimate terms with

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Davies, the other assignee, he considered him a most vexatious and litigious opponent; and instead of *Davies* conniving at the proof of the debt, it was most violently and obstinately opposed by his counsel in every possible way. The deponent added, that there were issue of the marriage two children, now living.

In reply to this affidavit, *Leigh*, the bankrupt, swore, that the bond and warrant of attorney and marriage settlement were executed by the deponent upon the following understanding, namely, that *Leigh* having purchased the *Sir Godfrey Webster*, a partnership should take place between *Leigh*, *Furlong*, and *Leigh's* son, to be called "the Cape of Good Hope Concern," for the purpose of general merchandize; of which *Leigh* was to receive one half the profits, *Furlong* one quarter, and *Leigh's* son, who was then at the Cape, the remaining quarter; and that *Furlong* was to go out to the Cape as the acting partner in the ship. That *Leigh's* share of the profits was to remain in the concern and to accumulate until it should amount to 5000*l.*, when the same was to be paid over to the trustees in satisfaction of the bond, warrant of attorney, and marriage settlement. That *Leigh* paid for the ship 3000*l.*, and for the outfit 1000*l.* and upwards. That the ship was registered in *Furlong's* name, but as a trustee for the concern; and before the ship could sail *Leigh* became embarrassed, when *Furlong* sold the ship for 1700*l.*, and paid off the ship's debts amounting to 600*l.*, as also 100*l.* to *Leigh*, retaining to himself the residue. That the ship was sold at a very great sacrifice, without *Furlong* having paid one shilling for the ship or disbursements other than two sums last mentioned. That *Leigh* never

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made any other offer of payment of the 5000*l.*, nor ever agreed or contemplated the payment of the 5000*l.*, other than under the agreement entered into on account of the ship; and that *Furlong* had not any means of making payments on account of the ship, as set forth in his affidavit.

Mr. *Twiss* and Mr. *Keene*, for the petitioners. It is not intended in this case to impeach the original contract between the parties. The bond given by the bankrupt was clearly a valid bond for 5000*l.* But it is contended, that certain circumstances, which have since occurred, would induce a Court of Equity to restrain the obligee from proceeding at law upon that bond. The objection to the proof in this case is not *in rem*, but *in personam*. When the bond was given by the bankrupt to the trustees, a partnership was in contemplation between the bankrupt and *J. W. Furlong*; and it was then understood between them, that the bond was not to be paid until *Leigh's* share of the profits should amount to 5000*l.* This partnership, which was to consist of a joint adventure to the Cape of Good Hope, never took effect; for *J. W. Furlong* had by his own act prevented the adventure from being proceeded with, having sold the ship which was fitted out for the intended voyage, and retaining 1000*l.* arising from the proceeds of the sale. It is admitted, that parol evidence is not admissible to vary the terms of a written agreement; but it has been decided, that such evidence may be admitted to raise an equity; *Doris v. Simmons* (a). We contend, therefore, that we have raised two equities in this case. First, it was never the intention of the bankrupt to give the

(a) 1 Cox. 494.

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King's Bench, in the case of the *King v. Scammonden* (a). I happened to be in Court at the time that case was decided, and remember it well. It was a question of settlement depending upon the 9 Geo. 1. c. 7. s. 5; that is, whether the purchase money given for an estate amounted to 30l., or not. The consideration expressed in the deed of conveyance was only 28l.; and it was ruled, that parol evidence was admissible to prove that 30l. was the real consideration. But that case was decided under special circumstances, and cannot govern the present. It appeared in that case, that the purchase deed had been already prepared specifying the consideration to be 28l., and that since the contract for the purchase the vendor, having had 30l. offered for the estate, refused to execute the deed, unless the purchaser made up that sum; upon which the latter paid the additional sum of 2l., without having the consideration altered that was originally expressed in the deed (b). The evidence in that case was not contradictory, but merely explanatory, of the deed. Here the bond is expressed to be for the payment of money absolutely, and at all events; and therefore evidence cannot be received to show, that it was to be payable only out of a particular fund.

Sir J. CROSS.—If there had been any fraud in this

(a) 3 T. R. 474.

(b) Mr. Phillips's observation upon the case of *Rex v. Scammonden*, in his valuable book of evidence, affords a just illustration of the grounds on which that case was decided. "The object of the proposed evidence," he says, "was not to contradict the indenture, but to ascertain an independent collateral fact, namely, whether 30l. had been *bond fide* paid as a consideration for the purchase of the estate; upon which fact the settlement would depend."

transaction, the case would have been different. But as it is, I think no parol evidence is admissible to do away with the effect of the bond.

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Sir G. ROSE concurred.

Petition dismissed with costs.

Ex parte BOOTH.—In the matter of DRAPER.

Westminster,
June 9.

THIS was a petition of an equitable mortgagee of a lease, for the sale of the mortgaged premises, upon the usual terms. It appeared that the bankrupt, when the lease was deposited with the petitioner, was in partnership with a person of the name of *Koe*, and that some time after the deposit the partnership was dissolved, when an arrangement was made between them as to the retention of the stock in trade, and the payment of the partnership debts.

A bankrupt, while in partnership with *K.*, deposits a lease with a creditor; and the partnership is afterwards dissolved, when certain arrangements are made between the bankrupt and the solvent partner. —Held, that no subsequent arrangement of this kind will affect the rights of the creditor under the original deposit, and that he is entitled to the usual Order for the sale of the property.

Mr. *Keene* appeared for the petitioner.

Mr. *Channell*, for the solvent partner *Koe*, contended that he had an interest in the lease, and that it could not, under these circumstances, be sold in the same way as if the partnership had continued, and a joint commission had issued against both partners.

ERSKINE, C. J.—There is nothing whatever in this objection. Any subsequent arrangement made between the bankrupt and his partner will not affect the rights of the petitioner under the original deposit. He is therefore entitled to the usual order, as in other cases.

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Westminster,
June 13.

Although an equitable mortgagee may waive his privilege to bid, the assignees must still have the conduct of the sale.

Ex parte SMITH.—In the matter of HARRISON.

MR. *SWANSTON* applied in this case on behalf of an equitable mortgagee, that he might have the conduct of the sale of the mortgaged premises, as he had waived his privilege of applying for leave to bid at the sale.

The COURT, however, thought that as it was always usual for the assignees to conduct the sale in these cases, the practice, which operated as a proper protection for the interests of the general creditors, was too reasonable to be disturbed; and refused the application.

Southampton-
Buildings,
June 21.

The petitioner, an equitable mortgagee of leasehold property, obtained an Order for a sale, at which 950*l.* was bid for the mortgaged premises, but they were bought in by direction of the assignees. The petitioner afterwards applied to the Commissioners for another sale, but the Order they made being unsatisfactory to

Ex parte WILLIAM BALDOCK.—In the matter of WILLIAM BALDOCK MOORE.

THE petitioner in this case was a creditor of the bankrupt to the amount of 15,000*l.*, and stated the following circumstances in his petition. The commission issued on the 14th May 1831, and on the 27th May 1831 the petitioner obtained an order of the Vice-Chancellor, referring it to the Commissioners to inquire whether the petitioner was an equitable mortgagee of any part of the estate of the bankrupt, and to ascertain the amount of his debt, and directing a sale of the mortgaged premises to be conducted by the assignees.

The Commissioners found, that the petitioner was an equitable mortgagee of various leasehold premises of him as to the time of sale, he refused to accept it; and the assignees afterwards obtained another Order, when the highest bidding was only 650*l.*:—Held, that the petitioner, by applying for a second sale, waived any claim against the assignees for the difference in the amount of the biddings at the first and second sale; but that he was entitled to be indemnified from the ground-rent and all expenses incurred since the first sale.

In the ordinary practice of hearing a petition on affidavit, it is irregular for a counsel to examine a witness *vivâ voce*, without any previous Order of the Court obtained for that purpose.

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the bankrupt, which they recommended should be sold by auction. Previous to the day appointed for the sale of part of these premises, which consisted of sundry messuages, warehouses and stables in Green Arbour Court, in the city of London, the petitioner caused the premises to be valued by a surveyor, who valued them at 900*l.*, subject to the ground rent; but the assignees prohibited the auctioneer from selling them under the price of 1800*l.*, though they had notice from the petitioner, that he should hold them responsible for any loss that might be incurred, in consequence of their putting a reserved bidding upon the premises so much above what they were really worth. On the 15th November 1831 the premises were put up to auction, when there was a *bonâ fide* bidding of 950*l.*, but the premises were bought in by direction of the assignees. At a subsequent meeting of the Commissioners on the 22d November, the petitioner applied to the Commissioners for a peremptory order for the sale of the premises without reserve, which the Commissioners declined to make, doubting their authority to do so. The petitioner, being afterwards unable to come to any settlement with the assignees for the sale of the premises, summoned a meeting of the Commissioners on the 27th December following, for the purpose of obtaining the same order he had previously applied for, when the Commissioners would only make an order for the sale of the property in the April following; which order the petitioner declined to accept, as the rent was going on, and it appeared to him doubtful whether as much would be offered for the property as had been offered before; and he therefore urged, that it should be sold at such a time as would enable the parties to complete the sale before the 25th March, when the rent would become

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Ex parte
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due. The assignees afterwards obtained an order for the sale on the 11th May, when the premises were, by their direction, again put up to auction, with a reserved bidding of 950*l.*, when the highest *bonâ fide* bidding was only 650*l.* The petitioner charged the assignees with having put a reserved bidding upon the premises on the 15th November 1831, with an improper motive; that the parties attending the sale were thereby prevented from purchasing the property, and the petitioner had sustained great loss, inasmuch as but for such reserved bidding the premises might have been sold, and a saving of six months' rent upon the premises would have accrued to the bankrupt's estate.

The petitioner therefore prayed, that the premises might be again put up to sale, and that he might have the conduct of the sale; that if upon such resale the premises should produce a less sum than would be sufficient to pay to the petitioner the sum of 950*l.*,—after deducting the costs, and the costs of the second attempted sale, and the ground rent, taxes and dues accrued due in respect of the premises, subsequently to the first attempted sale,—then that the assignees might be ordered to pay unto the petitioner such sum as, together with the money to be received for the purchase of the premises, after deducting the costs and charges before mentioned, would make the sum of 950*l.*

In answer to the facts alleged in the petition, *J. Affies*, one of the assignees, swore that he never heard of any notice from the petitioner that he should hold the assignees responsible for any loss that might be incurred, in consequence of their putting a reserved bidding upon the premises, when they were first offered for sale; and that the reserved price was much less than the premises ought to have produced at a public sale,

and that he always considered they were worth 1800*l.*; that he and his co-assignees had not any view whatever in putting a reserved price on the premises, but that of preventing a serious sacrifice to the bankrupt's estate; and were not in any manner, directly or indirectly, concerned in the sale, but for the benefit of the estate, and that the assignees acted in the matter according to the best of their judgment.

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The agent for *J. Solly*, another of the assignees, who acted in conjunction with them in the conduct and administration of the bankrupt's estate, deposed, that upon the first occasion of putting up the premises to sale, the assignees referred to the statement made by the bankrupt upon his last examination, wherein he stated upon oath that the premises were worth 3000*l.*, and that they had no other guide as to the value of them. That previous to the time appointed for the sale a meeting took place between the assignees, the auctioneer, and the petitioner's solicitor, for the express purpose of considering the price at which the premises should be permitted to be sold; when, after considerable discussion, it was suggested that the reserved bidding should be 1800*l.*, which the deponent verily believed was agreed to by all parties; and he denied the statement of the petitioner's solicitor, alleging that he should hold the assignees responsible for any loss. That neither the deponent, nor the assignees, were made acquainted with the previous valuation of the premises by the petitioner's surveyor, until the morning of the first intended sale; and that not knowing under what representations it had been made, the deponent and the assignees were unwilling to give implicit reliance to it, and had not sufficient time to inquire as to its cor-

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rectness. And that deponent and the assignees took great pains to inform themselves of the value of the property, and had many meetings and made many inquiries for that purpose.

The solicitor for the assignees also deposed, that he attended the meeting held prior to the intended sale of the 15th November 1831, which meeting took place at the request of the petitioner's solicitor; and that it was then agreed that the reserved sum of 1800*l.* should be put upon the property when it was offered for sale; that he did not hear the petitioner's solicitor state, that the assignees should be held liable for any loss in consequence of the reserved price, or any thing to that purport or effect; and that he was paying attention to all that passed on the subject, and should have made some observation on it, had such a statement been made. That it was a considerable time after the first attempt to sell the property, before any dissatisfaction was expressed by the petitioner or his solicitor as to the amount of the reserved price; and that previous to the presentation of this petition no attempt was made to fix any liability on the assignees. That the petitioner had stated to the deponent, that he considered the property as a safe security to him for 2000*l.*

Mr. *Montagu* and Mr. *G. Richards* appeared in support of the petition, and contended, that as the property, when it was first offered for sale, might have been sold for 950*l.*, if it had not been for the reserved bidding put upon it by the assignees, and when put up the second time could only realize 650*l.*, the assignees were bound to make good to the petitioner the difference between these sums. Neither the assignees,

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nor their solicitor, denied that they were aware of the previous valuation put upon the property by the petitioner's surveyor, and were therefore not justified in fixing so large a sum as 1800*l.* for the reserved bidding. But the question is, whether the assignees were entitled to put any reserved bidding whatever on the property, unless it was expressly agreed by the petitioner that there should be a reserved bidding. The assignees had no more right, than any other person, to throw any obstacle in the way of selling the property, and if they by their conduct have occasioned a loss, they ought to sustain the loss. This point was expressly decided in *Ex parte Lewis* (a). In that case an assignee had put up to sale the property of the bankrupt in two lots, which were bought in by the assignee, without the authority of the creditors, and upon the re-sale there was a loss on one lot, and a gain on the other; and it was held by Lord *Eldon*, that notwithstanding the balance was in favour of the bankrupt's estate, the assignee was chargeable with the loss on the lot under-sold. [Sir *G. Rose*. You might have been aggrieved in this case by the first sale; but you afterwards petition for a second sale. *Erskine*, C. J. By your application to the Commissioners for a second sale, you waived any right to complain of the first, and have repudiated the claim you might otherwise have had against the assignees, of holding them to their bargain.] The premises were not put up to sale again by the petitioner, but by the assignees; it was they, who obtained the order of the Commissioners for the second sale; and the petitioner was bound to wait the result of that proceeding, to ascertain whether there would be a loss or not. If

(a) 1 G. & J. 69.

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we had come sooner to this Court, we should have been premature, for *non constat* that we should have sustained any injury. But it now turns out, that the assignees have put the property up to sale a second time, without our consent, and have made a sacrifice of 300*l*. So far from the petitioner abandoning his claims against the assignees for their conduct at the first sale, he has regularly insisted upon his rights; and he ought not to have come here, before he knew whether any loss would eventually be occasioned by the result of the second sale.

In the course of Mr. *Montagu*'s argument, he put into the hands of the solicitor for the assignees a letter from the petitioner's solicitor, which he asked him whether he had not received. But the Court said, that Mr. *Montagu* could not examine the solicitor *vivá voce*, without his being submitted to a cross-examination, which would be inconvenient in this stage of the proceedings.

Mr. *Twiss*, who appeared to oppose the petition, on behalf of the assignees, was stopped by the Court.

ERSKINE, C. J.—The Court has no doubt in deciding, that the petitioners are not entitled to the difference between the sum bid at the first sale, and the amount of what was bid at the second sale. But we think, that there should be an order for another sale of the property; and as the last sale was at the instance of the assignees, and not at the instigation of the petitioner, we think that the expenses which have been incurred since the first sale, together with the ground rent and all dues since payable, should come out of the bankrupt's estate. The petitioner may have the conduct of the sale; and the costs of this petition, which are incurred by either party, are to be paid out of their respective estates.

Ex parte JOHN ANJER.—In the matter of HENRY
WOOD.

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Southampton
Buildings,
June 22.

THIS was a petition to annul a second fiat issued against the bankrupt, and for a *procedendo*, under the following circumstances.

On the 26th April 1832 a fiat was issued against the bankrupt, who carried on the business of an innkeeper at Bristol, on the petition of *J. Anjer*. On the 4th May following a meeting of his creditors was held, to take into consideration the state of his affairs; at which the bankrupt and *Thomas Kingston*, the creditor who issued the second fiat, attended. At this meeting, it appeared that the bankrupt was indebted to the amount of 16,000*l.*, of which 6000*l.* was secured by mortgages on his real estates; and the meeting was adjourned to the 14th May, in order that the bankrupt's books might be examined by an accountant; which meeting, however, did not take place till the 16th May, when the creditors agreed to grant the bankrupt a conditional letter of licence, under which *T. Kingston* and *J. Anjer* were appointed inspectors. It was stated in the petition, that the debts of the creditors who assented to this agreement amounted to 10,105*l.*, and that this was the whole amount of the debts not secured by mortgage, except a few smaller debts amounting to 328*l.* On the 31st May another meeting of creditors took place, at which *Kingston* attended; when it appeared that the only creditor, who refused to assent to the agreement, was *John Driver*, whose debt amounted to 70*l.* In consequence of his holding out, it was resolved by all the creditors but one, that the fiat already

Where the time for opening a fiat expires by the voluntary act of the petitioning creditor, and it appears that it was issued under suspicious circumstances, namely, for effecting a compromise with the creditors, and not with a *bond fide* intention of working it; and a second fiat is issued by another creditor under Lord *Loughborough's* General Order, the Court will not supersede the second fiat, merely because it was issued by a creditor who was a party to the intended compromise under the first, unless it is clearly for the advantage of the general creditors that the first should stand, and the second be superseded.

Where a petition prayed that the Court would reverse an order of the Lord Chancellor, and it was objected to for irregularity, on the ground that the Court of

Review has no power to reverse such order,—the objection was overruled; for though the Court cannot rescind such order, it can intimate its opinion to the Lord Chancellor, who would act accordingly.

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issued against the bankrupt should be immediately proceeded with. In pursuance of this resolution, the petitioner summoned the Commissioners for the 1st June to open the fiat; but this meeting was postponed to consider of an offer made by a friend of the bankrupt of the name of *Hall*, to guarantee to the creditors 5s. in the pound. On the 6th June, therefore, another meeting of creditors was held, at which *Kingston* again attended, when Mr. *Hall* offered to secure to the creditors 5s. 6d. in the pound; but *Kingston* moved, that nothing under 6s. 8d. in the pound should be taken; that one week should be allowed the bankrupt to obtain such guarantee; that the fiat should not be opened till the expiration of the week, and that if the bankrupt should fail in obtaining such guarantee, or any creditor of 20l. should not assent to it, no other meeting of creditors should be called, but that the fiat should be opened on the 13th June. It was alleged in the petition, that before this resolution was put, the chairman of the meeting, understanding that the time limited for opening the fiat had already expired, said, "It is of course understood, that no creditor will think of striking another docket, particularly none of those now present;" and that all the creditors present, including *Kingston*, assented to this proposition. On the 9th June, *Wood* having stated that he could not obtain the requisite guarantee, the petitioner proceeded on the same day to open the fiat; when *Wood* was duly declared a bankrupt, and the advertisement was sent by the following post to be inserted in the Gazette, where it appeared on the 12th of June. On the 11th June the petitioner first heard, that another fiat had been issued on the petition of *Kingston*, by Messrs. *Beran* and *Britton*, as soli-

citors, who (the petitioner alleged) were privy to the previous meetings of creditors, Mr. *Bevan* having attended at one of such meetings; and on the same day, before any meeting of Commissioners under this second fiat, a verbal notice was given by the petitioner's solicitor to *Kingston*, that *Wood* had been declared a bankrupt under the first fiat, and that the advertisement would appear in the Gazette on the next day, and that a petition would be immediately presented to annul the second fiat so obtained by *Kingston*. In the course of the same day, however, the solicitors of the petitioner were served with a copy of an order of the Lord Chancellor, dated the 9th June 1832, annulling the first fiat. On the 12th June the petitioner's solicitors, Messrs. *Cary* and *Cross*, gave notice in writing to *Kingston*, and his solicitors, Messrs. *Bevan* and *Brittan*, that *Wood* had been adjudged a bankrupt under the first fiat, and that it was intended to prosecute it, and that a petition would be forthwith presented to the Lord Chancellor to annul the second fiat. Notwithstanding this notice, however, *Kingston* caused the second fiat to be opened, and the advertisement under this second fiat appeared in the Gazette of the 15th June.

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Under these circumstances, therefore, the petitioner prayed that the second fiat obtained by *Kingston* might be annulled, that the Lord Chancellor's order obtained by him to annul the first fiat might be reversed, that a *procedendo* might issue, and that the costs of those proceedings and of this application might be paid by *Kingston*; and if it appeared necessary for the purposes of justice, then that *Kingston* might attend personally before the Court to be examined.

The above statement of facts was supported by the

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affidavits of *Anjer*, the petitioner, and his solicitors, Messrs. *Cary* and *Cross*.

In opposition to the petition, *Kingston* affirmed as follows :—That the fiat issued on the 9th June was in respect of a debt of 480*l.*, due from the bankrupt to *Kingston* and his copartners; that he did not deny having attended the several meetings of creditors mentioned in the petition; but that the meeting of the 31st May broke up, with the understanding that the first fiat would be forthwith opened by *Cary* and *Cross*, the solicitors for the petitioner; and that no large creditor, except Mr. *Hall*, was desirous that the opening of the fiat should be delayed; that *Kingston* himself was dissatisfied with the delay, and surprised to find that another meeting of creditors was called for the 6th June; that he understood the meaning of the chairman's observation at that meeting was, that no creditor would issue another fiat, so as to preclude the bankrupt from carrying into effect the proposed composition of 6*s.* 8*d.* in the pound, if the same could be done; but not to restrict any creditor from striking a docket, in case the bankrupt should be unable to procure his proposed guarantees, or the concurrence of his creditors; that the proposed guarantees not being procured by the bankrupt, Mr. *Hall* recommended *Kingston* to strike a docket against the bankrupt; that *Kingston*, being dissatisfied that the conduct of the bankruptcy should remain with Messrs. *Cary* and *Cross*, who were the solicitors of the bankrupt, and being desirous that no further delay should take place, on the 7th June instructed Messrs. *Bevan* and *Brittan* to strike a docket against the bankrupt; and he wholly denied, that at the meeting of the 6th June he either directly or indirectly, or by implication, or otherwise, engaged or

pledged himself to assent to any agreement or understanding, restricting him from striking a docket, or issuing a fiat against the bankrupt, in case he should be unable to procure guarantees for 6s. 8d. in the pound; and that, in striking such docket, he was solely influenced by a desire to benefit the general creditors of the bankrupt, and to prevent improper influence in the conduct of the first fiat, and further waste of time.

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Mr. *Bevan*, one of the solicitors who issued the second fiat, deposed, that at the meeting of the bankrupt's creditors on the 4th May, which he attended at the request of *Kingston*, he recommended that the first fiat should be opened without further delay, conceiving there was no other course from the embarrassment of the bankrupt's affairs; that no communication took place between himself and his copartner, and Mr. *Kingston*, or any other person, relative to the bankrupt's affairs, between the 4th May and the 7th June; on which latter day *Kingston* called at their office, and instructed the deponent to strike a docket; when, having ascertained by search of the London Gazettes that the time for opening the first fiat had long expired, he prepared the usual documents for striking a fresh docket, and forwarded them to London by the mail of the same day; that a docket was accordingly struck by the deponent's agents on the 8th June, and the first fiat was superseded for want of prosecution in the usual manner on the 9th June, and a second fiat issued on the same day; and that the *supersedeas* and the second fiat reached the deponent by the mail of Sunday the 10th June; that on the following day a copy of the *supersedeas* was served on Messrs. *Cary and Cross*, and that the deponent was not then aware that they had opened the first fiat; that, though at the

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time of opening the second fiat he was aware that the first had been opened, yet he conceived the same to be wholly null and void, as a supersedeas of it had been granted on the 9th June; that Messrs. *Cary* and *Cross* were the solicitors of the bankrupt; and that Mr. *Anjer*, the petitioning creditor under the first fiat, was not their usual client, but usually employed a different solicitor; and that the deponent was informed and believed, that *Anjer* was taken by the bankrupt to *Cary* and *Cross*, as his solicitors, to strike the first docket, and that a servant of the bankrupt had been appointed messenger under the first fiat, and was left in the possession of his effects; that the deponent was informed and believed, that *Anjer* had stated that his object in presenting the present petition was, that he might be enabled to obtain payment of the costs of and attending the first fiat, and of the meetings of the bankrupt's creditors, and that he should not have presented the same, if such costs could have been obtained by him under the second fiat; and that several of the bankrupt's creditors had expressed to the deponent their satisfaction, that Mr. *Kingston* had instructed him to issue the second fiat, as they conceived it would be more impartially proceeded with, than that in the hands of the bankrupt's solicitors.

Mr. *H. W. Hall* also deposed, that he attended the meeting of the 6th June on behalf of *John Hall* and *R. B. Ward*; and that he understood, that the remarks of the chairman, as to the issuing of a second fiat, were meant to induce the creditors not to strike a fresh docket, so as to prejudice the bankrupt in his endeavours to effect the composition within the time proposed, and were not meant to restrain any creditor from

proceeding, in case the bankrupt could not carry the resolution of that meeting into effect; that on the 7th of June he informed Mr. *Kingston*, that the parties, proposed as guarantees, had then wholly declined, and that he did not believe that the required guarantee could be obtained; and that when he gave this information he expressed his belief to Mr. *Kingston*, that it would be far more satisfactory to the general body of creditors, and more beneficial to their interests, that any proceedings to be adopted against the bankrupt should be under the control of the creditors, rather than in the management of the bankrupt and his solicitors.

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Mr. *Swanston* and Mr. *J. Russell*, who appeared on behalf of the petitioning creditor under the second fiat, took a preliminary objection to the prayer of the petition. The petitioner prayed, that the Court would reverse the order of the Lord Chancellor annulling the first fiat, which this Court had no authority to do. The Court of Review has no more power to interfere with the order of the Lord Chancellor, than the Vice-Chancellor has, in the most common form of proceeding, any power to reverse an order of the Lord Chancellor for six weeks time to answer. In all these cases, application must be made to the Lord Chancellor himself. The 19th section of the act (a), which constitutes this Court, expressly reserves the power to the Lord Chancellor to order any fiat to be rescinded or annulled, which order is declared to have all the force and effect of a writ of supersedeas. There is no power given by the act to this Court, to reverse such

(a) 1 & 2 Will. 4. c. 56.

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an order of the Lord Chancellor; consequently, the prayer of the petition is irregular and informal.

The COURT overruled the objection; the CHIEF JUSTICE observing, that though the Court had no power, given it in terms, to rescind the order of the Lord Chancellor, it could, nevertheless, intimate its opinion on the subject to his Lordship, and he would then act in accordance with the suggestion of this Court.

Mr. *Montagu* and Mr. *Koe*, in support of the petition, then submitted that the second docket was struck in violation of good faith. This might be collected from the statement made even by *Kingston* himself, at whose instance the second fiat was issued. *Kingston* must have known there was a *boná fide* intention to prosecute the first fiat, unless the bankrupt could effect a compromise with his creditors; he was, therefore, not justified in issuing the second fiat. In *Ex parte Freeman* (a), it was decided, that where there was a *boná fide* intention to prosecute a commission, although it had been actually superseded according to the provisions of the general order (b), yet that a second commission was not, as a matter of absolute right, to be granted to another solicitor; but that under certain circumstances the first commission might revive, and the second commission be superseded. And in *Harrison's* case (c), after issuing a commission, where a delay of even four months had occurred before any thing was done under it—which delay had arisen from the bankrupt, and not from the petitioning creditor,—a commission was ordered to be

(a) 1 Rose. 380.

(b) Lord Loughborough, 26 June 1793.

(c) 3 V. & B. 174.

proceeded with. Upon the same principle Lord *Eldon* held in *Ex parte Sanden*(*a*), that although a commission may be supersedable under Lord *Loughborough's* order, for want of prosecution, yet if any person, knowing it is to be proceeded in, takes out another, he will be liable for the costs. As to the reason assigned by *Kingston* for striking the second docket, namely, to prevent improper influence in the conduct of the first fiat—there is no weight in the objection, that the same solicitor, who had been concerned for the bankrupt, was employed by the petitioning creditor in issuing the first fiat, or that that fiat was taken out with the concurrence of the bankrupt.

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For these reasons, therefore, they contended that the original fiat issued by the petitioner ought to be proceeded with.

Mr. *Swanston* and Mr. *J. Russell*, *contrà*. The second fiat being now the legal fiat, and the creditor on whose petition it issued having a *bonâ fide* debt which is not impeached, the petitioner must show some good reason for the intervention of this Court,—some benefit that may be likely to accrue to the bankrupt's estate, before the Court will be induced to upset the second fiat and revive the first. This is not a question to substitute bankruptcy for compromise; but the only point is, whether the Bristol solicitors, who are the bankrupt's solicitors, and not those of the petitioning creditor, are to have the prosecution of the fiat. If there was a negotiation going on between the bankrupt and his creditors after the issuing of the first fiat,

(*a*) 1 Rose, 85.

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there would have been no difficulty in applying to the discretion of the Court for further time to open the fiat, before the time had wholly expired. There was no given period agreed upon at the meeting of the 6th June for the bankrupt to effect a compromise with his creditors; but the agreement then entered into was only a conditional agreement, to give the bankrupt an opportunity of endeavouring to effect such compromise. If there had been any specific agreement to give the bankrupt a week for this purpose, Mr. *Kingston* would then of course have acted contrary to good faith by issuing a fiat on the 9th of June, but no precise time was agreed upon. Unless the circumstances under which the second fiat was issued amount to fraud, there is no ground whatever for superseding it; and here we contend, that no fraud can be charged against us. [Sir *J. Cross*. The fraud imputed to you is this, that *Kingston* attended the several successive meetings to arrange the bankrupt's affairs; that he himself proposed the delay of a week, and before that time had expired, that he issued another fiat. Sir *G. Rose*. Before the petitioning creditor under the first fiat is entitled to say anything about fraud, he must show that he worked his fiat properly; but here the twenty-eight days expired long before the second fiat issued.] If nothing had transpired at the meeting of the 6th June, *Kingston* would of course have been competent to issue a fiat. It was therefore equally competent to him to do so, after it was impossible for the bankrupt to fulfil any agreement entered into by him on that day.

The cases cited on the other side do not apply to

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the facts of this case. In *Ex parte Freeman* (a) the order for the supersedeas was obtained by the petitioning creditor under the second commission, without disclosing to the Lord Chancellor the circumstances under which it was applied for, and which were known to the party at the time he obtained the order for the supersedeas—namely, that a petition had been presented by the petitioning creditor under the first commission, praying that the time for proceeding in it might be enlarged. In *Ex parte Sanden* (b), though the facts were similar to those of the present case, there was in reality no order made; so that that case is no authority for granting the prayer of this petition. The petitioning creditor under the first fiat in this case, without any previous connection whatever with the bankrupt's solicitor in the way of business, employs that solicitor to issue the fiat. It is clear, therefore, that this fiat was the bankrupt's fiat, and was issued, not with the intention of effectually prosecuting it, but for the purpose of driving the creditors into a compromise, or facilitating any other arrangement which the bankrupt might propose to make with them.

Mr. Montagu, in reply. The question here is, whether the creditor who issued the second fiat is not ancillary to the delay in prosecuting the first, and whether his conduct does not amount to a breach of good faith. He attended every meeting that was held to consider the propriety of working the first fiat, or accepting the composition offered by the bankrupt. At every one of these meetings he assented to the delay,

(a) 1 Rose, 380.

(b) 1 Rose, 85.

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impliedly,—at the last, avowedly and expressly. The objections that have been made to the first fiat are two: 1st, That it is issued by the bankrupt's solicitor: 2d, That there has been an improper attempt to effect a compromise. With respect to the first objection, it is sufficient to refer to the 42d section of the Bankruptcy Court Act (a), which expressly declares that no fiat shall be annulled, nor any adjudication reversed “by reason only that the fiat or adjudication has been concerted by and between the petitioning creditor, his solicitor or agent, or any of them, and the bankrupt, his solicitor or agent, or any of them.” Then, as to the second objection. With regard to compromises, there are two classes of cases; 1st, those before the commission has been opened; 2nd, those after it has been opened. The object, which the Court had always in view in superseding a commission on the ground of a compromise, was, that one creditor should not help himself at the expense of the others. But it was never the intention of the Court, that the petitioning creditor, with the great seal in his pocket, should use it as the *summum jus*, which is often *summa injuria*; but that he should use it kindly and discretely,—not for the purpose of tearing the poor bankrupt to pieces, but to make a reasonable and equitable arrangement with the creditors, if such could be effected without a commission. Any arbitrary and inflexible rule would be most mischievous, which compelled a petitioning creditor to go on with the prosecution of a commission, without any consideration of circumstances. If the great body of the creditors are willing to accept of terms of compromise, the petitioning creditor must have a heart as

(a) 1 & 2 Will. 4. c. 56.

hard as adamant, if he does not comply with the general wish. Lord *Eldon* says in *Ex parte Freeman* (a), that there may be circumstances to relax the rigour of the General Order(b); and that to hold that nothing but adjudication and advertisement in the Gazette can satisfy the intention of the order, would be most unwholesome. The supersedeas, too, in this case, was issued prematurely, and contrary to the spirit, if not to the terms of Lord *Eldon*'s General Order (c), which directs that no commission shall be superseded until after the second meeting.

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ERSKINE, C. J.—If the Court could see, that the administration of the bankrupt's effects could not as well be effected under the second fiat, as under the first—or that the proceedings under the second fiat could not be carried on as advantageously for the creditors,—means would have been found, without interfering with the Lord Chancellor's jurisdiction, to give effect to the first fiat. But it is not pretended, on the part of the petitioner, that *Kingston*, who sued out the second fiat, is not a good petitioning creditor; and it is asserted by the respondent, that the first fiat was, in truth, sued out by the bankrupt himself—having been issued on the application of the bankrupt, and the petitioning creditor having adopted his solicitors for that purpose. I own, there appears to me good ground for this assertion. For what was the first step of Mr. *Anjer*, the petitioning creditor under the first fiat? Exactly what would have been the conduct of the bankrupt himself. It is obvious, that the real object was for a compromise with the

(a) 1 Rose, 384.

(b) 26 June 1793.

(c) 21 August 1818; Buck, 281; 2 Deac. B. L. 102.

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creditors, and not with the *bonâ fide* intention of distributing the effects under the bankrupt law. But then it is said, that the recent statute does away with the former law relative to concerted commissions, and that though the fiat in this case might have been concerted by the bankrupt, yet that such concert would now be no reason for superseding it. But under what rule of practice did Mr. *Kingston* sue out the second fiat? Under a General Order of Lord *Loughborough's*, which directs, that any commission of bankrupt to be executed in London shall be supersedable for want of prosecution at the expiration of 14 days after the date thereof, and any country commission at the expiration of 28 days; and a preference is to be given, in issuing the supersedeas, to the application of *any other attorney* than the attorney who issued the first commission. There have been cases, certainly, where the Lord Chancellor has thought himself bound to interfere, by superseding a second commission in favour of the petitioning creditor under the first. But I think, under the circumstances of this case, we have not arrived at that point, which would justify our so interfering on the present occasion. In *Ex parte Freeman*, Lord *Eldon* expressly specifies as one of the grounds of his judgment, “that there was a *bonâ fide* intention to proceed with the first commission, prevented only by the concealment of the witness to the act of bankruptcy, who was kept out of the way on purpose.” Now, if I thought here, that the petitioning creditor had no improper object in issuing the first fiat, and had a *bonâ fide* intention to prosecute it, for the purpose of distributing the bankrupt's effects among his creditors—I should be inclined to supersede the second fiat in favour

of the first. But where there has been wilful delay in prosecuting a commission, it is not a sufficient reason, that it was at the request of the bankrupt, and with the concurrence of the creditors. This doctrine is laid down by Lord *Eldon*, in *Ex parte Luke* (a), who puts the interests of the public in opposition to those of the creditors, saying, that “till the bankruptcy is declared, the bankrupt is a person with whom all the world, ostensibly, and yet nobody, in reality, can deal.” It is not to be made a matter of bargain and stipulation, how long a fiat can be kept hanging over the bankrupt’s head by the petitioning creditor. The only grounds alleged for superseding the second fiat are, that it was sued out against good faith; but on the other hand it is alleged, that there was no agreement entered into by the creditors at the meeting of the 6th June to wait any specific period of time, but that the agreement was only conditional in the event of the bankrupt obtaining the proposed security. On the 6th June, the time for opening the first fiat had already expired, by the voluntary act of the petitioning creditor; and the question is, whether we should now interfere, and set aside the second fiat, which was regularly issued according to the terms of Lord *Loughborough’s* Order. I am of opinion, that we ought not so to interfere, and that this petition ought to be dismissed with costs.

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Sir J. CROSS.—I own that, till a late period of this discussion, it appeared to me that we could only take into consideration the respective rights of the two petitioning creditors. And if we could do so, without having any further object, then I should say that,

(a) 1 G. & J. 364.

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according to my view of the case, there was an acting contrary to good faith, on the part of Mr. *Kingston*. It is asserted by the petitioner, and I do not think it is satisfactorily denied by Mr. *Kingston*, that at the meeting of the 6th June it was agreed by the creditors, that one week should be allowed the bankrupt to obtain the guarantee of Mr. *Hall* in order to secure the creditors 6s. 8d. in the pound. Now if that be so, *Kingston* ought not to have taken advantage of the delay in prosecuting the first fiat, until the period of a week had expired from the 6th June. It is not without reluctance, I confess, that I am induced to come to a decision somewhat at variance with this view of the case. But as I can discover no advantage that will accrue to the general body of the creditors by the prosecution of the first fiat, I think we are bound, in strictness, to sustain the second fiat, and let things remain as they are. There is no reason to doubt that the second fiat is a good fiat, and can be properly worked; but there are some doubts as to the fair and impartial working of the first. It might also be held, perhaps, in an action brought by the assignees to recover the bankrupt's property, that the fiat was void, on the ground of being concerted by him with a creditor. The interests, therefore, of the general creditors require that the second fiat should not be annulled, but should be kept alive for their benefit. I can only wish that *Kingston* should have been made to pay the costs of this petition, but I regret that this cannot be the unanimous judgment of the Court.

Sir G. ROSE.—I apprehend that *Kingston's* conduct, whatever it may have been, cannot affect this question;

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which is, whether the second fiat has been legally issued, and ought to be sustained for the benefit of the general creditors. The 14th section of the Bankrupt Act (a) requires the petitioning creditor to prosecute the commission until the choice of assignees. But *Anjer*, who sued out the first fiat, chose to delay the prosecution of it, by negotiating for a compromise, which would have been nugatory, unless every creditor had concurred. Pending this negotiation, the time for opening the fiat expired; after which any creditor might issue a fresh one. *Ex parte Sanden* (b) has been cited in support of the arguments by the petitioner's counsel; but in that case, which was a petition to supersede a second commission in favour of the first, Lord *Eldon* refused to interfere. The principle established by him also, in the General Order of the 21st August 1818, warrants no such proposition as that laid down by Mr. *Montagu*. It is not, that a commission may not be superseded before the second meeting under Lord *Loughborough's* Order, for want of prosecution by the petitioning creditor; but that no commission shall be superseded, on the ground of consent of creditors, until after the second meeting. And the reason for making the order was, to prevent a great abuse which had crept into practice in issuing writs of supersedeas. For in many cases of petitions by the bankrupt to supersede, on the ground of the consent of creditors, the petition was presented after the first and before the second meeting; and in some cases, as the order expresses it, when the petitioning creditor alone had proved his debt and signed such consent, without the concurrence or knowledge of the greater number of the

(a) 6 Geo. 4. c. 16.

(b) 1 Rose, 35.

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creditors. But this has nothing to do with the duties imposed on the petitioning creditor under Lord *Loughborough's* Order. Under that order the petitioning creditor is bound to prosecute the commission without delay, or it is supersedable by any other creditor for want of prosecution, a London commission at the expiration of 14 days, and a country commission after 28 days. We have refused to enlarge the time for opening the commission at the instance of the petitioning creditor, on the ground of a pending negotiation for a compromise; and the same reason equally applies to a petition by the bankrupt; and indeed I have known it done in both instances. There are cases, also, where the Court has refused to enlarge the time, even where 20s. in the pound could be paid, and where it would do nothing more than restrain the advertisement in the Gazette. In a MS. case, with which I am furnished from the Registrar's book, Lord *Eldon* acted upon the same principle. That case occurred on the 26th December 1826, and is entitled *Ex parte Drew*, in the matter of *Shepherd* and *Fricker*. There had been no adjudication within the 14 days, and the Vice-Chancellor had made an order, on the petition of another creditor, to supersede the commission under the circumstances of the case, and the General Order; and this petition was to set aside that order. Lord *Eldon* thought the order right, and observed, that although the solicitors and the petitioning creditor under the first commission might justly be said to have meant well, yet the practice of holding over commissions, and setting at nought the standing order of the Court, was grown so frequent and was so often abused, that the Court must check the practice. In this case, also, there had been an

attempt at composition. The cases, therefore, are uniform in holding strictly the petitioning creditor to his duty, of prosecuting the commission for the sole purpose of distributing the effects of the bankrupt, according to the provisions of the bankrupt law. If he was permitted to make use of a fiat, not for the purposes of such distribution, but to effect a different arrangement with the creditors, great mischief would ensue. I am of opinion, therefore, that there are no grounds for this petition, and that it must consequently be dismissed with costs.

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ANJAN.

Ex parte GREEN.—In the matter of RIDLEY.

Southampton
Buildings,
June 23.

IN this case an Order had been obtained to amend the petition, by inserting a prayer for costs (a); which Order, it seems, was drawn up conditionally, that *Scott*, one of the parties interested, should be served with it, and that the petition should be brought on for hearing again in 14 days. That time being now expired, and *Scott* having never been served with the Order,

Order to amend, conditionally, that a party should be served, and the petition be heard in 14 days. Default having been made in these conditions, the petition was dismissed with costs.

Mr. *Kindersley* now moved, that an Order should be drawn up, absolutely, for the dismissal of the petition with costs.

Sir G. ROSE.—The course to be pursued is quite clear. You have now only to move to discharge the Order for amendment, and to dismiss the petition with costs, in which must be included the costs of this ap-

(a) See *ante*, p. 42.

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Ex parte
GREEN.

plication. For the petition being regularly continued, as appears from the registrar's book, you were bound to be here at the end of the 14 days.

Southampton
Buildings,
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Where a bankrupt omits to surrender within the given time, the Court will, under some circumstances, appoint a fresh meeting to take his surrender.

Ex parte JEFFREYS.—In the matter of JEFFREYS.

THIS was a petition of the bankrupt, praying that the Court would order the Commissioner to appoint a fresh meeting to take his surrender, the bankrupt having omitted to surrender within the time prescribed by the statute, in consequence of a negotiation that had been pending between him and his creditors for superseding the commission, but which had afterwards fallen to the ground. The assignee joined in this petition, which being supported by the proper affidavits,

The Order was made accordingly.

And see *Ex parte Shiles*, 2 Rose, 381; *Ex parte Berryman*, 1 G. & J. 223, and 1 Deac. B. L. 510.

Ex parte CLARKE.—In the matter of SEWERKROP.

Some day.

Petition to supersede, on the ground of there being no petitioning creditor's debt. The deposition of the debt referring to an account, which purported to be annexed, but which

was not to be found among the proceedings, the respondents were ordered to pay the costs of the day, the Court having for this cause adjourned the hearing of the petition,

THIS was a petition of a creditor to supersede the commission, on the ground of there being no valid petitioning creditor's debt, and that the bankrupt was not a trader. In the course of the hearing of the petition, the Court found it necessary to refer to the Proceedings under the commission, for the purpose of

inspecting the deposition made by the petitioning creditor in support of his debt. This deposition referred to a debtor and creditor account between the bankrupt and the petitioning creditor, which purported to be annexed to the deposition; but the account was now not to be found among the proceedings.

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Ex parte
CLARKE.

Mr. *M. D. Hill*, who appeared for the respondent, stated that the petitioning creditor had changed his solicitor, and that when the proceedings were handed over by him to the present solicitor, he had not delivered up this document.

Mr. *Swanston* and Mr. *G. Richards*, in support of the petition, contended, that as one of the objections raised by this petition was, that there was no valid petitioning creditor's debt, the respondents ought to have come prepared with this account, which was the most essential document upon the file; that they must have known long ago that it was not with the proceedings, and ought therefore to have applied to the Court before the day appointed for hearing the petition, that the petition might stand over, to enable them to produce the account.

Sir G. ROSE.—If the account is not produced, the commission ought to be superseded, at the costs of the parties who have issued it; or, at least, the costs of the day must be paid, if the hearing of the petition is put off to enable the respondents to explain why the account is not upon the proceedings.

ERSKINE, C. J.—The most favourable light in which

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Ex parte
CLARKE.

the Court can consider the non-production of the account is, that it is an act of gross negligence. The respondents must therefore pay the costs of the day, and the matter is not to come on again until the account is produced.

Mr. *M. D. Hill* hoped that the Court would reserve the question of the costs of the day, until the merits of the petition were finally decided.

Sir G. ROSE.—The payment of the costs of the day, under such circumstances as these, is an unmitigated condition of our adjourning the hearing of the petition for the convenience of the respondents.

Southampton
Buildings,
June 23

Ex parte SKIPP.—In the matter of SINGLETON.

Where the Commissioners have once rejected the proof of a debt, the creditor may petition to prove, notwithstanding the Commissioners referred him to a subsequent meeting, at which he declined to attend.

On a petition to stay the certificate, after an order has been obtained for its allowance, the Court will not open the order, unless it appears from the petition that the debt of the creditor would turn the certificate.

THIS was the petition of a creditor for an order that he might be permitted to prove his debt, and that the bankrupt's certificate might in the mean time be stayed. It appeared, that the petitioner attended at a meeting before the Commissioners to prove his debt, when the proof was rejected, but they referred him to a subsequent meeting, at which he did not think proper to attend.

Mr. *Rolfe* and Mr. *Armstrong* appeared in support of the petition.

Mr. *Talbot*, for the bankrupt, objected, that the creditor before he had presented this petition, should

1832.

Southampton
Buildings,
June 26.

Adjudication
stayed, on affi-
davit that the
party owed no
debt to the peti-
tioning creditor,
and had not
committed an
act of bank-
ruptcy.

Ex parte FLETCHER.

MR. *BICHENOR*, on the part of a trader against whom a fiat had issued, applied for an order to stay the adjudication,—the party having made an affidavit that there was no debt whatever due from him to the petitioning creditor, that he had committed no act of bankruptcy, and that he verily believed the fiat was issued against him for a vexatious purpose. In support of the application he cited *Ex parte Proston* (a), and *Ex parte Fletcher* (b).

The COURT made the order as prayed, but with liberty for the petitioning creditor to apply to the Court as he might be advised.

(a) 1 Rose, 259.

(b) *Id.* 336.

Ex parte FRANCIS.—In the matter of BROWN.

Same day.
New practice
suggested, on
pronouncing an
order of the
Court.

A misunderstanding having arisen in the discussion of this petition, as to the precise terms of a previous order made by this Court in the same matter,

Mr. *Spence*, who appeared for the respondents, observing, that the minutes of the order, as he took them down on his brief, differed materially from the minutes in the registrar's book,

Sir A. PELL proposed, that in future when the Court pronounced any order, after hearing a petition, the registrar should read aloud his minutes, to enable the counsel on each side to transcribe a correct copy of

them on his brief;—a mode, which he thought would save much time in future, that was now often lost in disputing about the real terms of an order,—and one which was adopted, with great convenience to all parties, by the Court of Exchequer.

1832.

Ex parte
FRANCIS.

Ex parte DRAKE.—In the matter of DRAKE.

THIS was a petition of the bankrupt to surpersede the fiat, on the ground that he was not a trader within the bankrupt law; the only trading alleged against him being that of a brickmaker, and the bricks being made from the soil of his own estate. It appeared, that the time for the bankrupt's surrender had been enlarged by an order of the Court until July next, but the petition for the supersedeas was presented before the 42d day.

Same day.

Before the bankrupt petitions to surpersede, he must surrender to the fiat, notwithstanding he presents the petition previous to the expiration of the 42 days.

Where a bankrupt petitions to surpersede, and at the same time brings an action against the petitioning creditor to try the validity of the fiat, he must elect which remedy he will pursue.

Mr. *Montagu* appeared in support of the petition.

Mr. *Whitmarsh*, and Mr. *Bethell*, for the respondent, took two preliminary objections to the hearing of this petition: 1st, that the bankrupt had not surrendered to the fiat; and 2dly, that he had brought an action against the petitioning creditor, which was still pending, to try the validity of the fiat. In support of the first objection, they cited *Ex parte Peaker* (a); where it was held, that a commission could not be superseded upon the petition of the bankrupt before his surrender, although all his creditors consented.

Sir G. ROSE.—Why do not you put Mr. *Montagu* to his election, whether he will proceed in the action or

(a) 2 G. & J. 337.

.1832.

Ex parte
DRAKE.

not? When the bankrupt has brought an action at law to dispute the validity of his commission, in that case his petition to supersede it cannot be heard.

Mr. *Montagu* contended, that it was entirely in the discretion of the Court to say, whether, or not, the petition should be heard, until after the trial of the action. *Ex parte Burgess* (a). But it seems clear, from the report of the case of *Ex parte Dick* (b), that the bankrupt may petition to supersede, and bring an action at the same time to try the validity of his commission. We should have been very glad in this instance to have proceeded first with the action; but they changed the venue from London to Devonshire, and by so doing prevented us from prosecuting it as speedily as we wished.

ERSKINE, C. J.—It appears to me, that you ought to make your election now, either to abandon your action, or to let the petition stand over till the result of the action is known.

Sir G. ROSE.—Lord *Eldon* laid down the rule in *Ex parte Burgess*, that where the bankrupt presents a petition while an action is pending, he must elect which proceeding he will discontinue. But there are other cases to the same effect, besides that of *Ex parte Burgess* (c). The common practice of every Court is, when there are different modes of proceeding for the attainment of the same object, to prevent a party from pursuing all at once.

(a) Jacob, 559.

(b) 1 Rose, 51.

(c) See *Ex parte Price*, Buck, 280.

Sir A. PELL.—At this time of day one would have supposed, that so plain a proposition as this, in regard to a matter of practice, would not even have borne an argument. The party has here two strings to his bow, and the plain rule seems to be, that he must elect which remedy he will pursue.

1832.

 Ex parte
 DRAKE.

Mr. *Montagu* then proceeded to answer the objection, as to the want of the previous surrender of the bankrupt. *Ex parte Peaker* does not apply to the present case; but even if it does, it has been shaken by subsequent decisions. The petition in that case was presented *after* the expiration of the forty-two days; and though Lord *Lyndhurst* said, he did not think the circumstances of that case would warrant him in making an exception to the general rule, that a bankrupt must surrender before he can petition to supersede,—yet he added, that the question might, for the regulation of such proceedings in future, be deserving of consideration. He distinguished that case, too, from the previous one of *Ex parte Carling (a)*, where Lord *Eldon* held, under very special circumstances (*b*), that as a commission of bankruptcy was merely a civil process, there was no reason why the bankrupt's surrender might not be dispensed with, upon a petition to supersede with the consent of all the creditors, notwithstanding the petition was presented long after the forty-two days had expired. But Lord *Lyndhurst* afterwards altered the

(a) 2 G. & J. 35.

(b) The circumstances were, that the bankrupt, when the commission issued, and for eight years afterwards, was living abroad, and avowed his intention of not returning to England unless his creditors chose to take 16s. in the pound, and consent to the commission being superseded, which all his creditors agreed to, and signed the petition for the supersedeas.

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opinion (a) which he had expressed in *Ex parte Peaker*, and agreed with Lord *Eldon*. And in *Ex parte Glynn* (b), the Vice-Chancellor made an order to supersede a commission on the petition of the bankrupt, although he had not previously surrendered.

Sir G. ROSE.—It has certainly been decided in *Ex parte Nichols* (c), that if the forty-two days have *not* expired, the objection as to the want of surrender does not apply, though there may be some doubt whether that case is law. But I have always understood the rule to be, that where the forty-two days *have expired*, the bankrupt must surrender before he can petition to supersede. The principle Lord *Eldon* acted on was this—the bankrupt, by neglecting to surrender before the expiration of the forty-two days, was not only guilty of a contempt of the Great Seal, but also of another tribunal, namely, the Commissioners before whom it was his duty to surrender; and Lord *Eldon* would entertain no petition from any bankrupt under these circumstances, until he had purged his contempt. But was there not a case in the matter of *Coles* and *Galpin*, in which this very question arose?

Mr. *Montagu*. In the case alluded to of *Ex parte Galpin* (d), it was not a petition to supersede upon the consent of creditors, nor was the petition presented until

(a) This was stated by counsel in the case of *Ex parte Glynn*, 1 Mont. 124, which occurred before the Vice-Chancellor, but no authority is cited for the fact.

(b) 1 Mont. 124. It does not appear, however, from the report of this case, whether the petition was presented *before*, or *after*, the expiration of the forty-two days.

(c) 2 G. & J. 101.

(d) 1 Mont. 207.

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after the forty-second day; the Vice-Chancellor therefore said, that he could not supersede on the application of the bankrupt, previous to his surrender; which was merely in confirmation of the general rule. But in the subsequent case of *Ex parte Norcott* (a), where the bankrupt was prevented by illness from surrendering on the forty-second day, Lord *Lyndhurst* made an order for the supersedeas, without the bankrupt's surrender. In *Ex parte Wood* (b), it was stated by Lord *Hardwicke*, that Lord *Macclesfield* had, in more instances than one, superseded a commission of bankruptcy to prevent a prosecution for felony against the bankrupt, where he had not surrendered himself within the forty-two days, if there did not appear to be any intention to defraud his creditors by not appearing within the time appointed, and where his absence proceeded rather from an ignorance of the consequence, or accident. So in the more recent case of *Ex parte Lavender* (c), Lord *Eldon*, recognizing the principle acted on by Lord *Macclesfield*, superseded a commission to which the bankrupt had omitted to surrender himself, through ignorance, and acting under the mistaken advice of his attorney. But the case of *Ex parte Nicholls* (d) is decisive on this point; for it is there held that a bankrupt, though he has not surrendered, may nevertheless sustain a petition to supersede the commission against him, where the petition is presented before the forty-second day. In *Ex parte Jones* (e),—where Lord *Eldon* held that a

(a) 1 Mont. 281. In this case, however, it appeared by the certificate of the Commissioners, that the bankrupt had duly surrendered himself at the second meeting, but was unable, through illness, to attend the third meeting, for the purpose of passing his last examination.

(b) 1 Atk. 222.

(c) 1 Rose, 55.

(d) 2 G. & J. 101.

(e) 8 Ves. 328.

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Ex parte
Drake.

bankrupt, who has neglected to surrender, cannot supersede his commission without first obtaining leave to surrender,—he states this reason for his decision, namely, “he has committed a felony, which cannot be got rid of in this manner.” But this reason would not apply to a petition presented *before* the time for surrender has expired. And it may be doubted, too, whether it applies to one presented afterwards. For if the omission to surrender has been caused by illness, or mere inadvertence, how can it be said that it amounts to a felony? In *Ex parte Jones* (a), it is true, Lord *Eldon* said, it would be attended with inconvenience, if the bankrupt was not to surrender until he had sifted to the bottom every ingredient of the bankruptcy. But why may not a person, who by an *ex parte* proceeding in a private room is declared a bankrupt, be permitted to sift every thing to the bottom, and show the illegality of the proceedings against him, before he is compelled to submit and acknowledge their authority?

Mr. *Bethell*, in reply, referred to the language of Lord *Eldon* in the last cited case of *Ex parte Jones*, where it was decided that a commission could not be superseded before the bankrupt has surrendered. “If the bankrupt,” his lordship says, “is not to surrender, until he has had sifted to the bottom here, the trading, the act of bankruptcy, and the petitioning creditor’s debt; when these particulars afterwards come to be proved before the Commissioners, many persons, against whom commissions of bankruptcy issue, will disprove

(a) 11 Ves. 409. This was a petition, like the present one, which had been presented *before* the time for the bankrupt’s surrender had expired, but which was not answered in time.

every thing." *Ex parte Nicholls* (a) is the only case that can be relied on by the other side; and that is rather a dictum than a decision. In that case there had been only one meeting held under the commission, and all subsequent proceedings before the Commissioners had been suspended; the bankrupt therefore, it was alleged, had no opportunity of surrendering. The dictum of the Vice-Chancellor goes a great way further than is warranted by the cases on this subject. And when the matter came on more deliberately for discussion in *Ex parte Peaker* (b), it was decided that the bankrupt must surrender before he could petition to supersede.

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ERSKINE, C. J.—The only case creating any difficulty in my mind is that of *Ex parte Nicholls*, in which the petition was presented within the forty-two days, as it is in the case now before the Court. Yet it is clear, even in that case, that justice required that the general rule should be relaxed; because the proceedings before the Commissioners had been suspended, and it was put upon the ground that it was impossible for the bankrupt to surrender. But that case by no means lays down a *general rule*, that the bankrupt may, in all cases, petition within the forty-two days to supersede his commission, without previously surrendering to it; for this would open the door to all the evils that were pointed out in *Ex parte Jones* (c). The general rule is, that the bankrupt must surrender before he can petition to supersede; and I see nothing in this case to take it out of the general rule.

(a) 2 G. & J. 101.

(b) 2 G. & J. 337.

(c) 11 Ves. 409.

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Sir A. PELL.—The safe and prudent course to pursue is, to act according to what Lord *Lyndhurst* lays down as the general rule in *Ex parte Peaker*, where he held that the bankrupt must surrender before he can petition to supersede, even with the consent of creditors. Now this is a case not sustained by the consent of creditors, as in *Ex parte Peaker*. But then it is said, that the decision in *Ex parte Nicholls* authorizes a deviation from the general rule. It is enough however to observe, that the decision of *Ex parte Peaker* is of later date. Then we have had our attention directed to the cases of *Ex parte Glynn* (a), and *Ex parte Norcott* (b); but those cases do not appear to me to apply very much to the facts of this case; for in *Ex parte Glynn* the creditors had consented to the proceeding, and *Ex parte Norcott* was under very peculiar circumstances; there the bankrupt had actually surrendered previous to the day appointed for his last examination. After due consideration of all the cases, it appears to me in every point of view, that the general rule has never been broken in upon, namely, that the bankrupt must surrender before he can petition to supersede.

Sir G. ROSE concurred.

The Court therefore ordered the petition to stand over until after the action should be determined and the bankrupt had surrendered; and the costs of the petition to come out of the estate (c).

(a) 1 Mont. 124.

(b) 1 Mont. 281.

(c) It certainly seems an absurd rule of practice, where the bankrupt *bond fide* contests the validity of the fiat, on the ground of the insufficiency of the trading, the act of bankruptcy, or the petitioning creditor's debt, that he cannot apply for a supersedeas without a previous surrender, and being compelled, in a certain degree, to submit to the very authority

which he insists is invalid. Sir *Wm. Evans*, in his sensible Letter to Sir *Samuel Romilly* on the revision of the Bankrupt Laws, recommends a middle course of proceeding on this subject, namely, to give the party an opportunity of submitting the question in each particular case to the consideration of the Court upon a particular motion; and that the surrender should be dispensed with, whenever the opposition to the commission appears to arise from a fair and real objection to its validity, and not from any vexatious or improper motive.—*Letter to Romilly*, s. xxvi. See also *Ex parte Clarke*, in *re Withers*, 15 Dec., and *Ex parte Foulger re Palmer*, 18 Feb. 1833, *post*.

1832.

—
Ex parte
Drake.

Ex parte CLARKE.—In the matter of SEWERKROP.

Southampton
Buildings,
June 26 & 28.

A WITNESS, of the name of *James Mahony*, who was summoned and attended to give *vivâ voce* evidence in the matter of this petition, which was heard on the 23d of June (a), was arrested for debt after leaving this Court while he was waiting to take his passage in the steam boat to convey him home to Gravesend.

A witness from *Gravesend* having attended this Court pursuant to a summons, being arrested for debt in *Pancras Lane, City*, while waiting for the conveyance home, was discharged; although he had, on leaving this Court, gone to *Catharine Street, Strand*. But without costs as against the officer, he not having been shown the summons to attend this Court.

Mr. *Swanston* now applied for his discharge, but he stated that he made the application on the representation of the party who instructed him, and not on affidavit.

ERSKINE, C. J.—There must be an affidavit produced to the registrar, and then you may take an order for the witness's attendance in this Court, with a view to his discharge.

Mr. *Swanston* accordingly mentioned the matter again at the next sitting of the Court, and stated that he was now prepared with the necessary affidavit. The witness swore, that he had been served with a summons to

June 28.

(a) See *ante*, p. 86.

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—
Ex parte
CLARKE.

attend the Court of Review on the 23d of June; that he left Gravesend on that day by the steam boat, for the purpose of obeying the summons, and that he was also subpoenaed to attend in the Court of Common Pleas at Westminster on the same day, as a witness in the trial of a cause of *Cripps v. Sewerkrop*; that the hearing of the petition in the Court of Review was put off on the application of counsel, and the cause in the Court of Common Pleas did not come on; that he then went in a direct road to London Bridge to get on board the steam boat, calling upon a friend in Pancras Lane in his way, who was to accompany him back to Gravesend; and while he was waiting in Pancras Lane till it was time to join the steam boat, the arrest took place.

Mr. *Barlow*, for the arresting creditor, opposed the application. The attorney in the suit had made an affidavit, in which he swore that he searched for the cause of *Cripps v. Sewerkrop* in the proper cause paper of the Court of Common Pleas, and that it was not in the paper of that day; and that after the witness had left the Court of Review, the attorney met him in Catherine Street in the Strand, and went with him to a tavern in an adjoining street. He submitted, therefore, that the witness did not go the nearest way home.

The COURT, however, made an order for discharging the witness from custody; but without giving any costs against the officer, as the order for his attendance in this Court was not shown by him to the officer previous to the arrest (a).

(a) Note.—Some few cases, which according to their date should have followed this, are unavoidably postponed, but will appear in the next Number.

In the matter of AUGUSTUS APPLGATH.

1832.

September 13.

Coram,
Erskine, C. J.
by consent.

Although an audit meeting has closed, and the assignees accounts are then settled, the Commissioner at any future meeting has power to examine the assignees as to monies received before and not included in such accounts, and to re-investigate those accounts generally if need be.

THIS matter came before this Court by an adjournment of a meeting of audit and for the examination of the assignees before Mr. Commissioner *Fonblanque*, under the 1 & 2 *Will.* 4. c. 56. s. 30. (a), pursuant to the following memorandum:—"At the Court of Commissioners of Bankrupt, Basinghall-street, the 1st August 1832, &c. This being the day appointed by me, by adjournment from the 23d July last past, for auditing the accounts, and for the examination of the assignees of the said bankrupt's estate and effects, and for reviewing the accounts of the assignees which had been passed at the audits held before the late Commissioners, as to certain alleged omissions therein of sums of money stated to have been received by the solicitor or agent of the said assignees; and Mr. *Bethell*, who appeared before me as counsel for *Henry*

(a) This section provides, "that any one of the said six Commissioners, if he think fit, may adjourn the examination of any bankrupt or other person to be taken either before a Subdivision Court or the Court of Review, and may likewise adjourn the examination of a proof of debt to be heard before a Subdivision Court; which said Court shall proceed with such last-mentioned examination, and finally, and without any appeal, except upon matter of law or equity, or of the refusal or the admission of evidence, shall determine upon such proof of debts; provided always, that in case, before the said Commissioner or Subdivision Court, both parties, the assignees or the major part of them, and the creditor, consent to have the validity of any debt in dispute tried by a jury, an issue shall be prepared under the direction of the said Commissioner or Subdivision Court, and sent for trial before the chief judge or one or more of the other judges; and if one party only applies for such issue, the said Commissioner or Subdivision Court shall decide whether or not such trial shall be had, subject to an appeal as to such decision to the Court of Review."

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APPLEGATH.

Weston, one of the assignees whose examination had been so adjourned as aforesaid, having objected to such examination and to such passed accounts being re-opened; and having stated that it was the intention of the said assignee, under the advice of his counsel, to appeal to the Court of Review in case such audits were re-opened: and it further appearing to me, that several questions of law and equity would arise out of the investigation of the accounts, and the conduct of the assignees, which I had not jurisdiction to determine, I do adjourn the further examination of the said *Henry Weston* to the Court of Review.

JOHN S. M. FONBLANQUE,
Commissioner."

In this case it appeared, that the commission issued against the bankrupt, *Augustus Applegath*, some time in the year 1826, at the instance of *Henry Weston*, the petitioning creditor, and who, together with *Thomas Bensley*, was chosen assignee, and *James Bethune Bostock* was appointed solicitor under the commission. At an audit meeting 9th January 1827, the sum of 4897*l.* 4*s.* 3*d.* was found in the hands of the assignees, and 4853*l.* 13*s.* 3½*d.* was ordered to be divided, retaining the sum of 43*l.* 10*s.* 11½*d.* till the next dividend, to answer such charges and expenses as the assignees might be liable to. At the second audit meeting, 6th May 1831, the Commissioners, by memorandum signed, certified that an account was produced, but the assignees refused to sign the same, on the ground that the balance thereby appearing due from them was not in their hands, and they adjourned the meeting till the 3d June then next, ordering a further

dividend to be advertised for that day. And by the same memorandum they ordered the balance appearing upon the said account to be paid into the bankers to the commission by Mr. *Bostock*. At the adjourned meeting on the 3d June 1831, the Commissioners found the balance of 2484*l.* 17*s.* 4*d.* to be in the hands of the assignees, and ordered 1718*l.* 14*s.* to be divided, and the sum of 234*l.* to be retained in the hands of the assignees. At this meeting an account was tendered by the assignees, to which the following memorandum was attached by the Commissioners:—
“ This account was passed subject to the investigation of the account tendered by Mr. *Bostock* this day.”
On the 23d June 1831, the following memorandum was also signed by the Commissioners:—“ Memorandum, that we the undersigned being &c. having declared a dividend on the 3d June inst. on an admitted balance, and postponed the audit of the accounts of the assignees to this day, met for the purpose of auditing the said accounts; and having examined the said accounts, and compared the receipts with the payments, do find that there was *at the least* a balance of 2199*l.* 3*s.* 8*d.* in the hands of the assignees on the said 3d June inst.”
It appeared that Mr. *Bostock* had been the party employed to get in, and was entrusted with the money belonging to the estate, and that the last-mentioned sum of 2199*l.* 3*s.* 8*d.* was composed of sums, part of which were received by him prior to the first dividend in January 1827, and were at that time due to the estate, and ought consequently to have been included in the accounts of the assignees at that time, and subsequently audited by the Commissioners. Mr. *Bostock* had, it appeared, since absconded and the creditors

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APPLIGATE.

now sought to charge the assignees with his defaults, and for that purpose proceeded to examine Mr. *Weston* before Mr. Commissioner *Fonblanque*. When the matter came before the Court by adjournment, the following question was propounded to Mr. *Weston* :—
 “Have you, or has Mr. *Bostock*, by your authority or otherwise, received any sum of money from any debtors of the bankrupt’s, or otherwise belonging to the bankrupt’s estate, previously to the time of any former audits of your accounts, which have not been given credit for, or included by you in those accounts?” To which he demurred, and gave the following reply :—“By the advice of my counsel I demur to the question, as the accounts have been audited and settled a considerable time ago, and so I protested before Mr. Commissioner *Fonblanque*. I am also advised, that the proper mode of proceeding in this case is by a petition to this Court, when the whole merits may be heard, and this Court will have authority to proceed personally.”

Mr. *Swanston* and Mr. *Anderdon* for the creditors.—
 Assuming for a moment that we charged this to be a case of gross fraud on the part of the assignees, and that they have wilfully passed their accounts with the knowledge that they were false, (although we do not pretend to carry it to that extent,) even then the demurrer to this question cannot avail them. The objection taken is, not that they will be answering that which may tend to criminate them, but merely that the accounts have already been audited and passed. The Court cannot adopt such a reason for their silence without some positive rule of law. In the 106th section of 6 Geo. 4. c. 16., there is no such rule implied; by

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Their power is co-extensive with the accounts themselves. Here also the Commissioners have expressly treated these accounts as unsettled and undetermined. As to the question, whether this Court has power to commit, where a case comes before them in the present shape, there can be no doubt that requires argument to remove(a).

Mr. *Montagu* for the assignees.—Mr. *Weston's* sole reason for refusing to answer the question proposed is, that by the mere adjournment of the examination to this Court, the whole circumstances, which are necessary to the doing of justice to the assignees, cannot be known. If this matter were properly brought before this Court by petition, or by motion, the whole merits would necessarily be developed, and the assignees would not be charged in respect of the defaults of others. I contend, that in the present shape of proceeding the assignees cannot be bound to answer this question. If Mr. *Weston* refuse to answer it before the Commissioner, he, singly, has no power to compel an answer by commitment; neither has this Court such power, where the matter comes before it merely in the shape of an adjourned examination. Again, the Commissioners having audited the accounts, cannot now proceed to re-audit them. Under the old law no such power existed, nor is any addition made by the new act. When the accounts are once determined by the Commissioner, his power is at an end, and the only mode of rectifying any mistake in the account, is by a petition to a higher tribunal; as, for instance, this Court. In the

(a) *Sed vide post*, re *Heath*, 8th Feb. 1833; re *Feaks*, 12th Feb. 1833; re *Smith*, 13th Feb. 1833; where the Court thought they had no such power.

case of varying or expunging the proof of debts, the Commissioners might, *at the same meeting*, receive further evidence, and alter or expunge the proof made at that meeting (*a*), but afterwards they had no power to do so, except upon petition; *Ex parte Whiteside* (*b*), *Ex parte Graham* (*c*). So it is in the case of a dividend. By the 101st section of the 6 Geo. 4. c. 16. the Commissioners have large powers and great facilities of examining the assignees; and if further justice is required, after the determination of the particular meeting in which these powers are ineffectually exercised, it can only be had on petition. Nothing, however, in that section extends to give power to the Commissioners to commit the assignees, in a case like the present. Neither can this Court, upon a mere transfer of matter by adjournment from the Commissioners. If it can commit, it is only by its original jurisdiction, and that by petition; for the 30th section of 1 & 2 Will. 4, c. 56., which authorizes the adjournment, gives this Court no greater power than the Commissioner himself has. So again by the 3d section of the same act all matters are to be brought on by way of petition, motion, or special case, according to the rules and regulations hereinafter provided. And then by the general order of the Court (*d*), the old practice is to be adhered to.

1832.

 In re
 APPEALANT.

Mr. Swanston, in reply, was stopped by the Court.

ERSKINE, C. J.—If I thought that the character of Mr. *Weston* was in any way brought into question, I should pause for a while before I delivered my judg-

(*a*) 1 Mont. & G. B. L. 311.(*b*) 1 Rose, 319.(*c*) 1 Rose, 456.(*d*) Ord. 35; 1 Dea. & Chit. xix. Append.

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In re
APPELGAATH.

ment. Or if I thought it was necessary to go through the facts in detail, or if I doubted whether it were more discreet to try the question on motion, or petition, I should deem the case worthy of some longer time for consideration. But it seems to me, that the matter turns neither upon the answer given by Mr. *Weston*, nor upon the nature of the proceeding by which it is brought before the Court.


The simple question is, whether Mr. *Weston* ought to answer the interrogatory put to him by the Commissioners, and not whether the power of this Court to commit arises. This being an adjourned examination, the Court will adopt the same principles as attached when before the Commissioner. But it is said, that the question ought not to be answered, because the Commissioner had no power to commit in case of refusal to answer. I take it, that prior to the 6 Geo. 4. the Commissioner had no power to commit the assignee, if he should refuse to answer. But the section 101 of the 6 Geo. 4., which is a new enactment, is a clear legislative exposition of the 33d and 34th sections; and though that section applies only to particular cases, yet I think the Commissioner has a general power to commit, from the very spirit of the statute. For if the right of commitment were to be the test of the Commissioner's power to examine, and he was held to have no such power to commit, then indeed he could have no power to examine at all. But it is absurd to suppose that the legislature, having given the power to examine, should be guilty of so gross an absurdity. The test of commitment fails therefore altogether. The power to compel an answer subsists somewhere; and it then becomes a question, whether the legislature imposed on

assignees the duty of accounting. The counsel for the assignees admit, that on a petition this Court would have power to compel an answer. As to the general order referred to, it can have no application in this case ; for here the power of adjourning an examination is entirely new, no such power having existed prior to the new act. I think that this is a fit question to be put by the Commissioners, and that it must be answered. But it is said, that as the audits have passed, the Commissioners have, as it were, become *functi officio* : to this I cannot subscribe. I think the duty of Commissioners is progressive and continuous. The legislature never meant to screen assignees in this wise, and to shut out the power of setting accounts right upon the disclosure of other prior receipts by agents. Neither is this the re-opening an old account as to monies already accounted for ; for here money has been, or is suspected to have been, received, which has never been in any manner brought into account.

1832.

In re
APPLEGATH.

This matter must therefore be referred back to Mr. Commissioner *Fonblanque*, with an intimation that the examination must proceed.



CASES

IN

MICHAELMAS TERM, 1832,

IN THE

THIRD YEAR OF THE REIGN OF WILLIAM IV.

MEMORANDUM.

In the course of this Term *Mr. Joy*, *Mr. Beames*, *Mr. Swanston*, and *Mr. Rolfe*, having been appointed His Majesty's Counsel learned in the Law, were called within the Bar, and took their seats accordingly.

In the matter of WILKINSON.

November 2.

Upon issuing a renewed country commission, it is the duty of the assignees or their agent (the solicitor) to ascertain whether the Commissioners are able and willing to act ; otherwise they are liable to the costs of a new fiat, if it be necessary, from inability or unwillingness to act on the part of the Commissioners who are named in the renewed fiat.

MR. BETHELL moved that a renewed country commission, which had issued in this bankruptcy in 1830, might be superseded, and a new fiat issued, under these circumstances. It appeared that the solicitor who had issued the renewed commission had become insolvent, and had caused some delay in opening it. In September 1832, when the present solicitor forwarded it to Newcastle, he found, that out of the five Commissioners named, one proved to be a creditor, and two others declined to act. *Mr. Bethell* urged that the costs might come out of the estate, as the neglect of the former solicitor had created the delay which produced circumstances causing the disinclination on the part of the two Commissioners to act.

The COURT granted the application, but refused to allow the costs out of the estate, as the solicitor ought

to have ascertained that Commissioners would act before their names were introduced into the commission. It would be too hard to burthen the estate with such costs.

1832.

Ex parte
WILKINSON.

Ex parte GEORGE GREEN and RAYMOND CRIPPS.—

In the matter of ROBERT ELLIS.

IN this case, on the 26th day of March 1832, a fiat issued against *Robert Ellis*, and the petitioners were duly appointed assignees. At a meeting on the 15th day of May, an affidavit was exhibited by *Jasper Rumboll Maskelyne* and *William Yorke*, stating that the said *Robert Ellis* was, at the date of the commission, indebted unto them in the sum of 725*l.*, viz. in the sum of 600*l.* for principal money lent and advanced by them to *Robert Ellis* before he became bankrupt, and in the sum of 125*l.* for interest on the said sum of 600*l.*, calculated to the 3d of January then last past, for which they held as security a promissory note given by *Robert Ellis* to them, bearing date the 3d day of November 1827, for the sum of 600*l.*, with interest at 5 per cent. Upon such affidavit *Jasper Rumboll Maskelyne* and *William Yorke* claimed to be admitted to prove as well the sum of 600*l.* as the sum of 125*l.* for arrears of interest thereon, as a debt under the said bankruptcy against the estate of the said bankrupt. The money advanced to the bankrupt was 600*l.*, which, by an indenture bearing date the 1st day of November 1827, made between the said *Robert Ellis*, of the first part, *Anna Maria Ellis*, then *A. M. Woodward*, of the second part, the said *Jasper Rumboll Maskelyne* and

November 3.

Where trustees under marriage settlement lend wife's money to husband with her consent, and husband becomes bankrupt, they cannot, on behalf of wife, prove for interest of money, but only for the principal; she having been supported by husband since marriage; upon the principles applicable to wife's pin-money. *Semble*, *secus* if they prove to save themselves from consequences of their own act, her consent not having been given.

1832.

Ex parte
GREEN
and another.

William Yorke of the third part, (being the settlement made previously to the marriage of the said *Robert Ellis*, and *Anna Maria* his wife,) was assigned unto the said *Jasper Rumboll Maskelyne* and *William Yorke*, their executors, administrators, and assigns, in trust after the marriage, with the consent of the said *Anna Maria Ellis* in writing, to place out and invest the same on such security, at interest, as they in their discretion should think fit; and it was by the said indenture declared, that the said trustees should be possessed of such monies and the securities on which the same should be invested, and the interest and yearly income thereof, upon trust to pay the interest and yearly income therefrom arising, as the same should be received, into the proper hands of the said *Anna Maria Ellis*, or otherwise sufficiently to authorize her to have and receive the same during the term of her natural life, for her own separate use and benefit, and so as that the same should not be subject or liable to the debts, engagements, control, or interference of the said *Robert Ellis*, her then intended husband: and it was thereby declared and agreed, that the receipt of the said *Anna Maria Ellis*, and her receipt only, should, notwithstanding her coverture, be a sufficient discharge for so much of the said interest and yearly income as should from time to time be therein acknowledged to have been received; and after the decease of the said *Anna Maria Ellis*, upon certain other trusts by the said indenture declared concerning the same.

The said marriage took place shortly after the date of the indenture, and the sum of 600*l.* was, with the privity and consent of the wife, lent and advanced by *Jasper Rumboll Maskelyne* and *William Yorke*, as the trustees of the settlement, to her husband, upon his

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and another.

promissory note; and he and his wife continued to live together from the time of their marriage up to the time of his becoming a bankrupt; and during all the time that they so lived together, the wife was maintained by and at the sole expense of the said bankrupt. The petitioners claimed, that for so long as the said bankrupt and his wife lived together, no demand could be made against him or his estate for the interest of his wife's separate property, and that therefore no interest was due from the estate of the bankrupt at the time of his becoming bankrupt in respect of the sum of 600*l*. Notwithstanding the objection was urged and insisted upon on behalf of the petitioners before the Commissioner, he admitted *Jasper Rumboll Maskelyne* and *William Yorke* to prove not only the principal sum of 600*l*., but also the sum of 125*l*. for arrears of interest thereon, as a debt against the estate of the bankrupt; and the petitioners claimed, that any interest that accrued due to the trustees in respect of the 600*l*. during that time, became due to them as trustees for the wife, to whom the same might have been paid, and who could have given a discharge for the same without the concurrence of the trustees; and in case any proof could be allowed to be made against the estate of *Robert Ellis* in respect of the interest, the wife ought to join in such proof. The petitioner prayed that the debt of 725*l*. so admitted to be proved by the trustees under the fiat, might be reduced to the sum of 600*l*.; and in order thereto that the proof of the debt, as far as regards the sum of 125*l*. for interest on the sum of 600*l*., might be expunged or varied as the Court should direct, and for their costs out of the said bankrupt's estate.

1832.

Ex parte
GREEN
and another.

Mr. *Wilbraham*, for the assignees, the petitioners, contended, that this case came within the principle of those relating to the wife's pin-money; or where an account had been sought against the representatives of the husband in respect of the wife's separate estate received by him during his life-time; *Powell v. Hankey* (a); *Ridout v. Lewis* (b); *Thomas v. Bennett* (c); *Peacock v. Monk* (d); *Squire v. Dean* (e); *Smith v. Lord Camelford* (f); *Parkes v. White* (g). And at all events the Court would never direct an account beyond the period of a year. In *Ridout v. Lewis* there was an agreement by the husband to pay the arrears to the wife; that therefore varied from the present case, but still it is an authority, as showing what would have been the decision in the absence of that circumstance.

Sir G. ROSE.—The principal question is, is this a breach of trust or not? the proof is by the trustees alone. If the act of suffering the husband to take this interest constituted a breach of trust, then the proof is correct by the trustees alone, and the cases cited do not apply, because it is the trustees who are seeking to recover back money just the same as a common creditor. If the money was lent with the consent of the wife, then the proof may be said to be by her, and the cases are too strong and numerous to be got over.

Mr. *Wilbraham*. I contend that the money was applied by the husband with her consent, and therefore she is not entitled to recover the interest.

(a) 2 P. W. 82.

(b) 1 Atk. 269; 2 Atk. 104.

(c) 2 P. W. 341.

(d) 2 Ves. sen. 190.

(e) 4 Bro. C. C. 326.

(f) 2 Ves. jun. 698.

(g) 11 Ves. 225.

Sir G. ROSE.—The proof being by the trustees they are *primâ facie* entitled to sustain it, unless it turns out that the wife consented.

1832.

Ex parte
GREEN
and another.

Mr. Swanston. We admit that the wife's consent was given; and although the proof is by the trustees, yet it is not to protect themselves, but made for the wife's benefit. The Commissioners do not always require the *cestui que trust* to join in the proof, and such has been the case in the present instance; we rely on the terms of the settlement. The cases of pin-money cited on the other side do not apply, as they are not concerning the property of the wife but of the husband. If the fund had been lent to a third party, then there can be no doubt but that the trustees would be entitled to recover. And this case is merely a question between the husband and the trustees. There is no inference from the passive consent of the wife, that any authority was given or promise made not to demand the restoration of this income; on the contrary, an agreement is to be presumed on the part of the husband, that he shall stand indebted to the wife or her trustees for the amount of it. In *Parker v. Brooke* (a), the account was carried down beyond the year.

Mr. Wilbraham, in reply, was stopped by the Court.

ERSKINE, C. J.—The case of *Parker v. Brooke* does not apply. It was a much stronger case; for there no trustees being interposed, the husband, as it were, himself became trustee for the wife, and as such became responsible for the acts which he performed.

(a) 9 Ves. 583.

1832.
 —
 Ex parte
 GREEN
 and another.

That also was against a purchaser or mortgagee from the husband with notice of the wife's title. It was merely a question between a mortgagor and a mortgagee. There can be no doubt that the trustees, being the payees on the note, have a legal claim, and if they had come here and said that they had lent the property to the husband, and were responsible to the wife, they would have a right of proof. But that is not this case; for here they disclaim such liability, and say it was advanced with the wife's consent. The question, therefore, is, whether the wife, or the trustees in her name, can recover. There is no evidence or even supposition of any demand made for re-payment of the interest. We should, therefore, presume the wife's consent was given. And indeed the interest may be said to be substantially repaid, it having been applied to their mutual expenses of living. I therefore think the proof of the interest ought to be expunged.

Sir J. CROSS and Sir G. ROSE concurring,

The Order was made to expunge the proof for the amount of the interest, with costs out of the bankrupt's estate.

Ex parte PIGEON.—In the matter of RAMSEY.

November 5.
 Where equitable deposit is made, accompanied with memorandum, for debt, subsequently discharged, and on fresh debt contracted, it is verbally agreed that deposit shall continue as security for latter debt, mortgagee is not entitled to the costs out of produce of sale.

IN 1819 the bankrupt being indebted to the petitioner in the sum of 250*l*., the former deposited with the latter title-deeds, accompanied with a written memorandum, by way of equitable mortgage. An account

of the account was taken, and it was verbally agreed that the deposit should continue as security for the latter debt, and that the mortgagee was not entitled to the costs out of the produce of sale.

current existed between them up till the year 1831, when a balance was struck, and the bankrupt was found indebted in the sum of 700*l.*, and a verbal agreement was entered into that the deeds should stand as a security for that amount. The petitioner prayed for a sale of the security, and the only question was as to the costs.

1832.

 Ex parte
PIGEON.

Mr. *Turner* for the assignees.

Mr. *Richards*, for the petitioner, contended that the original memorandum which accompanied the deposit was sufficient to entitle him to the usual order in such cases. But

The COURT considered that the memorandum was exhausted, and must be regarded as altogether at an end. The extension of the security for the 700*l.* being then unaccompanied with a written memorandum, the petitioner must pay the costs.

Ex parte ARNSBY.—In the matter of LORD.

AS in the case of *Ex parte Williamson* (a), the Court in this matter, upon an application by Mr. *Wright*, refused to refer affidavits for impertinence until the petition should be heard, since it was impossible to decide on impertinent matter without going into the whole merits of the petition.

November 7.

Affidavits not
referred for im-
pertinence till
hearing of peti-
tion.

(a) 1 Dec. & Ch. 529.

1832.

Ex parte
ARNSEBY.

Court will not
order *vivâ voce*
examination in
first instance
before hearing.

In the same matter.

UPON an application of Mr. *Montagu*, the Court refused to issue process for *vivâ voce* examination of witnesses until the petition was first heard on the affidavits, when they would be more competent to decide whether such an examination was necessary. The Court treats the granting of a *vivâ voce* examination in the same manner as the directing an issue (a).

(a) Ex relatione Mr. Barber, Dep. Reg.

Ex parte WILLIAM MUNK.—In the matter of
WILLIAM MUNK.

November 7.

Court will not,
under any cir-
cumstances, be-
fore hearing,
order bankrupt
to give security
for costs.

Motion for it
refused with
costs, to be set
off against those
due from bank-
rupt.

Where former
petition of bank-
rupt was, by the
Vice-Chan-
cellor, dismissed
on merits, with
costs to be paid
by the bankrupt,
who continues
in contempt for
non-payment of
them, he has no
locus standi in
this Court, being
considered in
contempt of this Court also.

THE petition in this case was presented by the bankrupt to supersede the commission. It appeared that he had presented a petition in June 1827, to the Lord Chancellor, in which the same parties were respondents, and the object of which was precisely similar to the present. That petition came on before his Honour the Vice-Chancellor; and after being fully heard, it was, on the 22d of October 1828, dismissed, and the bankrupt was ordered to pay the costs. These costs were taxed at the sum of 71*l.* and personally demanded of the bankrupt, but were not paid. In default of payment the bankrupt was committed to the Fleet, and was still in contempt for non-payment thereof. Subsequently, the bankrupt brought an action in the Common Pleas against the person employed as

And former decision on same matter held an estoppel.

auctioneer under the commission, in order to try the validity of his commission; but, although notice of trial was given, the bankrupt never proceeded to trial. Under these circumstances a Motion was this day made by

1832.

Ex parte
MUNK.

Mr. *Twiss* and Mr. *Girdlestone*, jun. for the respondents, that the hearing of the petition might be stayed until the petitioner gave security for costs of the petition. The respondents had not yet filed any affidavits, and their object was to avoid the expense of doing so, under the certainty that they never would receive the costs of them, owing to the total insolvency of the petitioner.

The COURT considered that the application was, to say the least, premature. The proper course was to wait till the petition was called on, and then to take the objection that the bankrupt was in contempt and could not be heard, or that the former decision was an estoppel. But an application that a bankrupt shall give security for costs under such circumstances was never heard of; it being contrary to the usual course of things even to order the bankrupt to pay costs except under very special circumstances, which could not be determined till the merits had been heard.

The motion was therefore refused with costs; which, however, were directed to be set off against those due from the bankrupt.

Mr. *Swanston*, for the petitioner, then proceeded to open the petition, upon which

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Ex parte
MUNK.

Mr. *Twiss* and Mr. *Girdlestone*, jun. took the preliminary objections, first, that this was in the nature of an appeal from the judgment of the Vice-Chancellor, and that this Court therefore had no jurisdiction; as to which they cited *Ex parte Benson* and others (*a*). 2d. That if it was not in the nature of an appeal, the former judgment of the Vice-Chancellor being on the same petition and against the same parties, was a complete estoppel to the hearing of a petition precisely similar: and 3d. That the petitioner not having paid the former costs, and being therefore in contempt, had no *locus standi in curiâ*.

Mr. *Swanston*. This is not an appeal, nor any thing in the nature thereof: it is simply a new petition, quite separate and independent of the former, and cannot be brought into that class of cases that have lately been decided relative to the jurisdiction of this Court. As to the petitioner being in contempt, it forms no objection; he is not in contempt of this Court—but of another foreign to this. The other side contend, that it is immaterial of what Court he is in contempt, and state as a general proposition, that being in contempt of any Court is a bar.

Sir J. CROSS.—The decision of His Honor the Vice-Chancellor was in bankruptcy; his jurisdiction, or rather the power delegated from the Lord Chancellor in bankruptcy, is by this Court act (*b*) entirely gone, and in its place this Court now stands; this Court therefore is but a continuation of the Vice-Chancellor's Court for

(*a*) 1 Dea. & Chit. 324. S. C. 1 Mont. & B. 142.

(*b*) 1 & 2 Will. 4. c. 56.

purposes of bankruptcy, and it may properly be said to be a contempt of this Court.

1832.

Ex parte
MUNK.

ERSKINE, C. J.—The former petition was dismissed with costs, and in all other Courts the non-payment of costs of a former similar proceeding is an objection to a subsequent one, independent of contempt; as for instance, on a second action of ejectment.

Sir G. ROSE.—The term contempt is in equity a mode of expression, and may be termed a metaphorical expression. It bears the strictest analogy to the proceedings on non-payment of costs ordered as in other Courts. Here, a petition has been dismissed with costs. Those costs not being paid, how can the petitioner be heard? Besides, here the orders for payment of costs and of commitment are filed in the bankrupt office; it is therefore a contempt of this Court.

Mr. Swanston. I take leave to submit that the bankrupt is not in contempt of this Court. This Court has determined it could not take judicial notice of an order of the Vice-Chancellor; and in the case of *Ex parte Ferris* (a) has refused to grant the four-day order for payment of costs, the former order having been made by the Vice-Chancellor.

Sir G. ROSE.—In *Ex parte Ferris* the party came here to bring another into contempt, and in effect to enforce an order of another tribunal. In this case however the order of the Vice-Chancellor is already enforced, and the party is in contempt. The two cases are quite different.

(a) 1 Dea. & Chit. 498. S. C. 1 Mont. 513.

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Ex parte
MUNK.

Mr. *Swanston*. Lord *Eldon* has (and I doubt not is in the recollection of His Honor Sir *G. Rose*) frequently overruled such an objection to a petition for a supersedeas; *Ex parte Eager* (a). In *Ex parte Thomas* (b) in like manner a former trial was held to form no objection to another issue; and the assignees were restrained from setting up an objection founded on the non-payment of costs.

ERSKINE, C. J.—In *Ex parte Thomas* the petition was not dismissed on the merits of the case; neither can we presume that the nonsuit was on the merits. It is not always so. So, in that case the merits were never gone into, which was the ground on which the judgment of the Vice Chancellor rested.

Sir G. ROSE.—*Ex parte Thomas* is not applicable, because the Chancellor had no authority to make any order till the action had been tried, it was a matter of necessity to try the action in the first instance. So in *Ex parte Eager*, the bankrupt was proceeding in *formâ pauperis*, and the Court was satisfied there was no bankruptcy.

Mr. *Swanston*. I contend that by the motion we have heard this morning for the giving security for costs, the bankrupt is brought into Court, thereby the objection that he cannot be heard is waived. That motion is dismissed with costs, which are to be set off against those due from the bankrupt. The liability of the bankrupt is completely altered, he is no longer indebted in the amount for which he is in custody, and

(a) 1 Mont. 85.

(b) 1 Mont. & M. 64; 2 G. & J. 278.

therefore entitled to his discharge, and the contempt is at an end.

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MUNK.

Mr. *Twiss* in reply was stopped by the Court.

ERSKINE, C. J.—The Court is of opinion that the bankrupt has no *locus standi* in Court until he has cleared his contempt. There is in general a disposition to hear a bankrupt's petition to supersede, and it is in that spirit of mercy that the costs are not usually ordered to be paid by him. But the facts of this case are very peculiar, and the dismissal of the former petition with costs to be paid by the bankrupt, shows the total absence of pretence for his petition in the mind of the judge before whom it was heard, and forms the very reason why we should refuse to hear him. This is not like a case where there is a nice question of right to be tried, but so totally without foundation that costs have been awarded against a bankrupt. For the reasons before mentioned, I do not think the cases cited have any application to the present. I think this petition is vexatiously presented, and in all cases the Lord Chancellor has discountenanced these applications so circumstanced. Had it not been the case of a bankrupt we should certainly have ordered security to be given for costs.

Sir J. CROSS.—Bankrupts are generally favoured by courts of justice, but there must be limits to that favour, and other parties rights must be looked to. In this case, the commission is of long standing, and we should be careful, on that ground alone, before we overhaul all the proceedings that have taken place

1832.

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Ex parte
MUNK.

under it. The same petition has been already heard and was dismissed, with the singular circumstance of costs being ordered to be paid by the bankrupt. Had the bankrupt felt himself aggrieved by that decision, why did he not petition for a re-hearing? Instead of doing so he lies by for three years, and then presents a similar petition. This is not to be suffered. He is in contempt and cannot be heard.

Sir G. Rose concurred.

The proceedings on the petition were therefore ordered to be stayed till the bankrupt had cleared his contempt.

Ex parte THEOPHILUS THOMPSON.—In the matter of
GEORGE WYATT and HENRY THOMPSON.

November 13.

A. covenants to pay annuity on default of B. A. becomes bankrupt before any default. The annuitant cannot prove against A.'s estate, he not having contracted a debt until the default made either under the 54th or 56th clauses of 6 Geo. 4.

BY indenture of lease, dated 1st September 1831, made between *George Scott* of the first part, *Henry Thompson*, the bankrupt, of the second, and *George Smallwood* of the third part, (which lease recited certain articles of agreement, dated 24th July 1827, between the above *G. Scott* and the bankrupt *H. Thompson*, whereby *G. Scott* agreed to demise to *H. Thompson*, his executors, administrators, nominees and assigns, certain premises, which were by the said lease of the 1st September 1831 demised to *G. Smallwood*), *G. Scott*, upon the express direction of *H. Thompson*, did, together with *H. Thompson*, lease to *G. Smallwood* the said premises situate in St. Peter's Terrace, in the hamlet of Hammersmith, for the term of 80 years.

1832.

Ex parte
THOMPSON.

By an indenture or grant of annuity, dated the 31st October 1831, made between *G. Smallwood* of the first part, the bankrupt, *H. Thompson*, of the second part, the petitioner, *T. Thompson*, of the third part, and *Frederick Elijah Thompson* of the fourth part; after reciting the indenture of the 1st September 1831, and the said agreement, and that *G. Smallwood* had contracted and agreed with the petitioner for the sale to him of an annuity of 112*l.* for the term of 100 years, if the petitioner and *Elizabeth Anna Maria* his wife, and *William Thompson* the younger, and *Eliza Thompson*, the son and daughter of the Rev. *W. Thompson*, or any or either of them, should so long live, to be secured payable and redeemable as therein mentioned, at and for the sum of 1400*l.*; and to be also secured by the warrant of attorney of *G. Smallwood* for 2800*l.*, and reciting that it was agreed upon the purchase of the annuity that for the better securing unto the petitioner the due payment thereof, the same should be charged upon the said premises mentioned in the lease; and that the same premises should be demised unto the said *F. E. Thompson*, for the remainder of the term, upon trust as hereinafter mentioned; it was witnessed that *G. Smallwood* did grant unto the petitioner, for and during the term of 100 years, and during the life or lives of either the petitioner or his wife, *W. Thompson* the younger, or *Eliza Thompson*, an annuity of 112*l.* out of and chargeable out of the said premises, for which intent the said premises were demised as aforesaid, to *F. E. Thompson*, upon trust for the better securing the said annuity. And it was further witnessed, that *H. Thompson*, at the request and as surety for *G. Smallwood*, did promise and agree to and with

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Ex parte
THOMPSON.

the petitioner, that if the said *G. Smallwood*, his heirs &c. should make any default in payment of the said annuity of 112*l.* or in payment of costs thereof, by reason of the non-payment or delay of payment of the said annuity, or any part thereof, then and in such case that the bankrupt, *Henry Thompson*, his heirs &c. should and would from time to time, from and immediately after any such default should be made as aforesaid, well and truly pay unto the petitioner, his executors &c. the said annuity, and all arrears and all costs, charges, damages, and expenses to be occasioned or sustained by him by reason of any default in payment of the annuity.

The petition proceeded to state, that on the 8th December 1831, a commission of bankruptcy issued against the above bankrupts, *George Wyatt* and *H. Thompson*.

G. Smallwood made default in payment of the three quarterly payments of the annuity to the petitioner as they respectively became due on the 31st of January, 30th April, and 31st July 1832(a), and on application made to him by the petitioner's solicitor for payment of the same, *G. Smallwood* stated that he was unable to pay the same, or any part thereof, he being in indigent circumstances: and no payment was made by *Smallwood* or *H. Thompson* to the petitioner, on account of the annuity, since the grant thereof. The petitioner, on the 22d March 1832, attended a general meeting to prove the value of the annuity, against the separate estate of *H. Thompson*, but the proof was rejected.

Under these circumstances the petitioner prayed leave to prove the value of the annuity against such separate

(a) All since the date of the commission.

estate, and that the Commissioner might ascertain the value thereof, pursuant to the 6 *Geo.* 4. c. 16. s. 54.

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Mr. *Montagu* for the petitioner. The question on which this petition rests, is, whether the bankrupt had contracted a debt within the meaning of the 6 *Geo.* 4. c. 16. ss. 54. 56 (a). In *Ex parte Tindal* (b), Lord Chief Justice *Tindal* points out the general hardships which existed before the passing of the act, and the object which the legislature had in inserting the 56th clause of the 6 *Geo.* 4. The object in reference to annuities, was to relieve not only the annuity creditor, but also the bankrupt debtor and his surety. And the question here is, is the bankrupt surety a debtor within the meaning of that clause? In *Baxter v. Nicholls* (c), it was held that bankruptcy and certificate

(a) The words of the 54th section are as follows:—"That any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the Commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission."

By section 56 it is enacted, "That if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the Commissioners to set a value upon such debt, and the Commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon: or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividend with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

(b) 1 Dea. & Chit. 303.

(b) 4 Taunt. 90.

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THOMPSON.

of the surety discharge the bankrupt, and therefore that such debt was proveable under the commission. [Sir *J. Cross*. In that case the defendant, who was a surety, had, with three others, jointly and severally granted by deed to the plaintiff an annuity, and jointly and severally covenanted for payment; being therefore not a mere surety, but a party covenanting to pay the annuity, in the first instance: a very different state of circumstances from the present case.] I contend that the liability of the bankrupt, in the present case, lies in covenant to pay on default of another party, or, in other words, is a debt payable on a contingency. It is the mere common case of a covenant by a surety, that if the principal makes default, he, as surety, covenants to pay the debt. But being a surety he is not to be called upon until such default. It is a debt *debitum in presenti solvendum in futuro*, that is, on the default of his principal. It is no matter, as regards the question of proof, whether the forfeiture takes place before or whether after the bankruptcy, the debt being contracted at the time of the execution of the deed of annuity, and the non-liability to pay until the default actually takes place, makes no difference as to the existence of the debt. The very meaning of the term surety, implies a present liability to be called upon at a future period on the happening of a certain event. In *Ex parte Tindal* the husband had covenanted that his executors should pay after his death, thereby contracting a debt for which he, during his life-time, could never be called upon to discharge; and yet it was held to be a present debt, *solvendum in futuro*, and proveable under his bankruptcy. In certain cases, I admit that the contingency has been regarded as too remote

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to be brought within the operation of the act, as for instance, bills of exchange. In those cases, if the default in payment by the acceptor has not actually happened, the drawer or indorser cannot be called upon on his bankruptcy; and for this reason, that it cannot be ascertained whether or not the party primarily liable will or not be able to discharge the debt. In this case, however, that default has actually happened, Mr. *Smallwood* having declared his total insolvency, and consequent incapacity to pay the annuity. It is impossible to contend that the operation of the act is to be limited to the cases mentioned in the 52d, 53d, 54th, and 55th sections, else the 56th is altogether nugatory: and if not nugatory, it must extend to cases of guarantees, such as the present. In the case of *Clayton and Gosling (a)*, where the maker of a promissory note payable twelve months after notice with interest, "for value received," became bankrupt before notice had been given, it was held that the note was within the 7 Geo. 1, c. 31, and proveable under his commission.

Mr. *Twiss* and Mr. *Wright* for the respondents, the assignees. The case of *Barter and Nicholls* was between the grantor and grantee of an annuity, and does not touch the present question, which is merely relating to the liability of the surety. This is not a question between the grantor and grantee of the annuity, but merely between the grantee and the surety, dependant also on the ability of the grantor to pay the instalments as they become due. The common law certainly gives no right of proof in case of contingent

(a) 8 Dowl. & R. 110; S. C. 5 Barn. & C. 300.

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debts in general, the provision as to them arising purely from legislative enactment. If that enactment gives no remedy in a case similar to the present, there is nothing *dehors* the statute that warrants the relief sought upon the present application. In the case of *Ex parte M'Millan* in re *Sowerby*(a), where it was held, that if a surety became bankrupt, the creditor could not, under the 49 Geo. 3. c. 121. s. 8. prove the debt if it became due (as in this case) after the bankruptcy, Lord Eldon says, "Now if *A.* and *B.* are principal and surety, *B.* may, under this act(b), pay the debt, and prove under *A.*'s commission, which before he could not have done. But in the present case it is the surety, and not the principal, who has become bankrupt, and it is the creditor who applies to prove a debt which was not due at the time of the bankruptcy." In the case of *Clayton v. Gosling*(c) the term "value received," was held to constitute a present debt, and on that ground alone it was that the proof was held admissible. Neither was it considered a contingent debt at all, it was only a debt payable at a future time certain. In *Hoffham v. Foudrinier*(d), a covenant in an indenture made between *A.* and *B.* (assigning to *A.* £350/., payable under articles of agreement by *J. S.* to *B.* by instalments), that in case the said sum, or any instalment thereof, should not be paid to *A.* at the time specified, *B.* would, on demand, pay to *A.* the said sum or instalment, was held not to be discharged by the bankruptcy of *B.* as to any instalments accruing after the bankruptcy, the same not being

(a) *Buck*, 287.

(b) 49 Geo 3. c. 121.

(c) 8 D. & R. 110, S. C.; 5 B. & C. 300.

(d) 5 M. & S. 21.

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Ex parte
THOMPSON.

proveable under the commission. Lord *Ellenborough* in that case says, "This is not a debt due from *B.* until default made by *J. S.*, it is a collateral engagement only. It is essential that the party should be a creditor at the time of the bankruptcy. Here the bankrupt was only contingently liable in case another person should make default." And Mr. Justice *Bayley* says, "It was not the intention of the legislature to lock up the property of a bankrupt upon the possibility that at some period or other some person may have a claim upon it." The meaning of the act is not that the "debt contracted" shall be construed a demand capable of arising, and in the present case there is no debt contracted until the default should have been made by the principal, which did not happen till after the bankruptcy, and therefore is not proveable. The cases of *Attwood v. Partridge* (a), *Boorman v. Nash* (b), *Ex parte Lancaster Canal Company* (c), *Uttersen v. Vernon* (d), *Ex parte Adney* (e), were also relied on by the respondents.

Mr. *Montagu* in reply. The case of *Ex parte M'Millan*, as reported in *Buck*, p. 287, does not appear to be very accurately reported, and therefore little reliance can be placed upon it (f). In *Ex parte Fairlie* (g), which was a case of a nature similar to the present, the only doubt as to the right of proof arose out of the peculiar and special covenant, which limited the rights of the parties *until after demand* had been made, upon which covenant the whole question turned.

(a) 4 Bing. 209.

(b) 9 B. & C. 145.

(c) 1 Mont. 27.

(d) 3 T. R. 539, 4 T. R. 571.

(e) Cowp. 460.

(f) See 1 Mont. & G. 216, n. (b).

(g) 1 Mont. 17.

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THOMPSON.

I contend that the object of the 56th section must have been to remedy those hardships that existed before the passing of the 6 Geo. 4., and this case is clearly one of them.

ERSKINE, C.J.—It appears to me, that no question in this case can arise on the construction of the 54th section of the 6 Geo. 4. c. 16., that section in no way applying. Here the bankrupt is not an annuity debtor, but a party merely undertaking that in certain events he will be liable. Then again it is contended, that it comes within the 56th section. I am, however, of a contrary opinion. Now let us look at the words of that section; they are, “*that if any bankrupt shall before the issuing of any commission have contracted any debt payable upon a contingency,*” &c. The first step therefore to be taken is, to ascertain whether any *debt* is actually contracted at the time of the bankruptcy. If no debt is contracted, the ulterior inquiries as to the value become superfluous. I cannot see the applicability of many of the cases cited for the petitioner; for in order to make out that the bankrupt had contracted any *debt*, you must show that something was owing—that there was a debt existing at the period of the bankruptcy—a *debitum in presenti*, though *solvendum in futuro*. The present is said to be such a debt payable on the default of *Stalwood*. This is not, however, a joint and separate engagement of both to pay the annuity, but only an additional contract to indemnify in case of the grantor’s default; and the grantee had no power whatever to come against the surety till after his principal had made default. Had there been a positive contract by the surety to pay at all events, the case might have been very different. This then is a mere engagement

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THOMPSON.

to become liable on the event of default, till which no liability exists. This is not, as in the case of *Ex parte Fairlie*, a contract joint and several by three or four persons. Without the preliminary default of the principal, the creditor could not, in the case before us, have sued the surety; but in *Ex parte Fairlie* he might have sued any one of the parties contracting in the first instance, without previous default of the four, and he was prevented from proving against the separate estate of one, only because there was an express stipulation that before he should be sued a *demand should be made* on him individually. But that case, I think, is a very strong authority the other way, in favour rather of the respondents. There was a covenant that a demand should be made before the liability should arise. Here that default should be made by the principal in payment; in both cases constituting a condition precedent. No default was made before the bankruptcy, and therefore no debt existed at that moment. The cases cited by the respondents, and especially that of *Hoffham v. Foudrinier*, are very strong to show the necessity of an actual debt at that period, in the sense contended for, in opposition to the petition. For these reasons I think the proof cannot be admitted.

Sir J. Cross.—Although it is said a debt was contracted at the time of the bankruptcy, it is not attempted in this case to define what that debt was in amount or nature. Debt however implies, in all cases, a sum certain. Even if the principal had become a bankrupt, he could not be called a debtor to the full amount of the value of the annuity at the time of the bankruptcy, and the annuitant would be entitled to no

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relief, except under the 54th section. Supposing both principal and surety had been bankrupts, if the petitioner's argument were right, then he would be entitled to prove the full value against both their estates. I entirely concur with his Honor the Chief Judge; for, in addition to these reasons, I cannot see how it is possible to value the annuity as far as the surety's liability extends, since it is impossible to ascertain whether the principal may not, notwithstanding his present insolvency, be able to pay future instalments; and to render any such debt proveable, it must also be capable of valuation.

Sir G. ROSE.—The only question here is, is this or not a debt contracted at the time of the bankruptcy. I certainly think not, and for the reasons given by his Honor the Chief Judge. This is not a debt, but is merely a covenant to become indebted. Neither in this case is there any consideration moving from the principal or the guarantee to the surety, which alone is sufficient to distinguish it from *Ex parte Fairlie*.

The petition was thereupon dismissed with costs.



Ex parte LUPTON.—In the matter of LUPTON.

November 14.

Court will not
supersede com-
mission 30 years
old, unless all
creditors con-
sent.

MR. *WRIGHT*, in this case, applied that the commission which had existed for upwards of 30 years, and under which all the creditors had been paid except one, by whom a claim had been placed on the proceedings, but had never been established, might be

superseded. The Commissioners had certified the above facts, but

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Ex parte
LUTTON.

The COURT thought, that on such grounds they had no jurisdiction to accede to the application, but allowed the matter to be mentioned again.

Ex parte Hamilton, post, 140.

Ex parte PETHERIDGE.—In the matter of PETHERIDGE.

THIS was an application by a bankrupt that he might be declared entitled to the allowance of 5 per cent. The estate had produced exactly sufficient *in toto* to pay a dividend of 10s. in the pound, inclusive of the allowance sought to be obtained.

November 15.

Where bankrupt's estate is exactly sufficient to pay 10s. in the pound, he is not entitled to 5 per cent. allowance: and dividend being declared, he cannot *claim* any allowance out of it.

Mr. *Bethell* and Mr. *Ayrton*, for the petitioner, contended that the allowance was to be considered as a *per centage* on the dividends; and although by the deduction of the 5 per cent. the dividend actually paid would be less than 10s. per cent., yet the bankrupt was entitled to the allowance. Although the Bankrupt Act (a) is in general construed most favourably for the creditors, yet as the legislature must have had a view to the bankrupt's benefit, in the 128th and 129th sections of the 6 Geo. 4. c. 16., as far as related to the construction of those clauses, it must be construed most beneficial for the bankrupt. The allowance is to be regarded as a premium to the bankrupt for his good conduct in raising the proceeds of his estate to 10s. in

(a) 6 Geo. 4. c. 16. s. 135.

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the pound, and is a per centage on that amount. The words of the 128th section are, “ if the net produce of his estate shall pay creditors 10s. in the pound, the bankrupt shall be allowed 5 per cent. out of *such* produce;” that is, out of the net produce producing the dividend of 10s. The words “ shall pay” must be construed “ shall be sufficient to pay.” The words of the old act (a) are, that bankrupts “ shall be allowed the sum of 5 per cent. out of the net produce of all the estate that shall be recovered in and received, which shall be paid unto him, &c., in case the net produce of the said estate, *after such allowance made*, shall be sufficient to pay the creditors, who have proved their debts under the said commission, the sum of 10s. in the pound,” which being so materially altered in the 6 Geo. 4. c. 16. by the omission of the words “ *after such allowance made*,” clearly shows the intent of the legislature to give a more extensive right to the bankrupt, and to include such rare cases as the present. If *A.* employs *B.* to let his house, and says to him, if you get 1000*l.* you shall have 5 per cent. for your trouble, that is clearly 5 per cent. to be deducted out of the 1000*l.*, and yet in effect *A.* only gets 1000*l.* *minus* 50*l.*

Mr. *Montagu*, for the assignees, mentioned the case of *Ex parte Pavey* (b).

ERSKINE, C. J.—I am clearly of opinion that the bankrupt has no right to the 5 per cent. allowance. The words of the act are explicit, and must be taken as they are found. The term “ shall pay” must be taken to mean that the creditors shall “ receive” 10s. in the

(b) 5 Geo. 2. c. 30. s. 7.

(b) 2 G. & J. 358.

pound; and if we look to the latter part of the section, we find a still stronger expression, namely, "if the produce shall *not pay* 10*s.* in the pound," then a smaller allowance is to be paid. So in the 129th section the words are, "if a sufficient dividend *shall have been paid.*" I therefore think the estate must actually pay 10*s.* in the pound, to entitle the bankrupt to 5 per cent., and therefore he is not entitled in this instance.

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PETHERIDGE.

Unfortunately the assignees have declared the dividend of 10*s.*; that cannot be recalled. They ought to have declared a smaller dividend, which would doubtless have enabled the bankrupt to receive the lesser allowance of 3 per cent., according to the latter part of the 128th section. The case put by the counsel for the petitioner would receive a different construction if the terms were, that "if you sell my house and it pays me 1000*l.*, you shall have 5 per cent.;" following the words of the act.

Although the circumstances of the case press peculiarly hard upon the bankrupt, we cannot give him any relief. He must be left to the mercy of the creditors, and the petition must be dismissed.

Sir J. CROSS and Sir G. ROSE concurred.

Petition dismissed.

Ex parte HAMILTON.—In the matter of HAMILTON.

November 20.

THIS was a petition to supersede a commission. All the creditors consented, with the exception of one, who is abroad, and B. holds power of attorney from A. authorising him to consent: Held B. was entitled to consent: and an attested copy of power ordered to be filed with the proceedings.

Where all creditors consent to supersedeas except A., who

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HAMILTON.

was abroad. *A.* held a general power of attorney of that party, which authorized *A.* to consent, and which he did on behalf of the absent creditor. The Commissioner required that the original power of attorney should be delivered up and attached to the proceedings, but as it related to other matters this was objected to.

Mr. *Montagu* now applied that an attested copy of the power of attorney might be deemed sufficient.

The COURT granted the order, the original being exhibited and compared with the copy, and marked by the officer examining, and directed such attested copy to be attached to the proceedings.

ANONYMOUS.

November 21.
Court will not
order *viva voce*
examination in
first instance
before hearing.

THE COURT intimated that they would always hear a petition upon affidavit in the first instance, and after that would, if necessary, order an examination *viva voce*, but would not proceed to such examination in the first instance.

Ex parte SAMUEL HEATH.—In the matter of JOHN
HEATH.

November 14.

On a summary
application
against the as-
signees for de-

THIS petition was filed on the 25th of October 1832, and stated that a fiat issued against the above-named delivery up of goods, seised by them as the property of the bankrupt under the fiat, out of the hands of the petitioner (a stranger to the bankruptcy) who claimed the goods as his, but who, together with the bankrupt, had been indicted for a conspiracy in secretly and fraudulently removing the goods, which indictment was still pending:—The Court refused to decide on petition till after the trial, on the ground that it would tend to disclose the assignees' evidence in support of the indictment.—*Cross, J. dissent.*

bankrupt on the 14th of August 1832, he having carried on the business of a linen draper at Gosport. The petitioner also carried on business on his own and sole account at Newport, in the Isle of Wight, as a draper. On the 23d and two following days of April, the petitioner, being in London, bought several quantities of drapery goods of different houses in London, (the several items were set out in the petition); and also between the 22d of February and the 4th of August bought great quantities of goods from the bankrupt (also set out in the petition), all which were for the sole use of his own trade. On the 8th of September the messenger and accountant under the commission came to the petitioner's house and seized the whole of the petitioner's shop goods, fixtures, furniture, money in the till, and every other individual article of his property, and carried them away, and finally turned him out of the house. There was, as alleged, no property of the bankrupt (who was the petitioner's brother) on the premises, yet the assignees under the commission continued to retain the possession of the property. On the 10th of September the assignees indicted the petitioner and the bankrupt, at the Old Bailey session, for a conspiracy in fraudulently and secretly disposing of the bankrupt's property, and on the 11th of September arrested and brought the petitioner to London and committed him to Newgate. The petition proceeded to pray the restitution of the property.

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HEATH.

The affidavits in support of the petition merely went to prove the property of the goods to be *bonâ fide* in the petitioner, while those in opposition extended to show a contrary belief, and stated that a true bill was returned on the indictment by the grand jury. That

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the indictment was removed by *certiorari* into the King's Bench by the petitioner and the bankrupt, and that the assignees believed the object of the petitioner, in presenting the petition and lodging the *certiorari*, was to obtain from the assignees, by affidavits in answer to the petition, the evidence which they intended to use upon the indictment, which, if allowed, would defeat the ends of justice.

The affidavits in reply, however, denied the truth of these allegations.

Mr. *Twiss* and Mr. *Russell* for the petitioner. The assignees not having filed affidavits in contradiction of the merits alleged upon the petition, should be considered as virtually acknowledging them, and thereby we are entitled to the order we seek. [Sir *G. Rose*. I think the principal difficulty in the way of the petition is the delay that has taken place between the happening of the injury and the day on which the petition was filed, namely, the 8th of September and the 25th of October. Why could not the application have been made, at least, on the 27th of September, on which day this Court was sitting in the long vacation?] Mr. *Twiss* and Mr. *Russell*. In the first place by this act of oppression the petitioner was deprived of every species of property, and was left at the moment without the pecuniary means of bringing forward his claim. He was reduced to that state of absolute poverty that we may readily assume he had become paralyzed in all his exertions to recover his lost property and credit in the world. Or we may assume that he was fully occupied in obtaining his discharge from custody and in

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HEATH.

preparing for his defence to the indictment. Nor is it to be supposed that he was aware that he could find the means of redress during the long vacation. Although that might have been known to those who had previously business in this Court, yet it is hardly fair to assume that every person, or even every attorney, was aware of such extraordinary sittings, as the Court in its indulgence to suitors, then appointed, the Court having, at the termination of its sittings prior to the long vacation, intimated that it would not resume, till the first seal in the following (the present) term. But besides these general reasons, the nature of this application is not to be likened to injunctions, where, we admit, that unless the party apply promptly, his application is often refused. The analogy fails in this respect, namely, that in injunctions sought before the hearing of a cause, the same identical remedy (as in this case, the restitution,) would be obtained on a decree, as would be produced by the injunction, only with less dispatch. In the present case, however, we cannot have the identical remedy that is now sought for, by any other mode of proceeding either *in presenti* or *in futuro*. This, too, is a case of irreparable waste and mischief, and the whole existence of the petitioner depends on his obtaining immediate restitution. As to the indictment, parties have, in many cases, a right to apply to a court for immediate restitution of property, and also afterwards to bring an action for damages for its detention. The rights are perfectly distinct, as should also be the remedies, as in the case of a wrongful sequestration. An indictment is often preferred as a mere trick to deprive parties of their just rights, either by the intimidation which is caused, or

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HEATH.

by other incapacities which it induces. It is a common thing, when a witness is about to be tendered, for the other party to prefer an indictment for perjury, and then, when the witness is called, to object that he cannot be heard because of the pendency of such indictment. Such an objection has, however, been always over-ruled and discouraged by courts of law. We contend that the indictment will not try the right to the property in question, and therefore ought not to be urged as an excuse for the silence of the assignees, or as any reason for delaying this application. Moreover, the indictment now pending may not probably be tried for months, during all which time the petitioner's credit is receiving accumulating and progressive injury; the goods themselves, by which we wish to re-establish ourselves in the world, are becoming day after day less valuable from the constant change of fashions, so much so that they may ultimately become comparatively worthless. And if we are driven to our remedy by action, the same injuries from delay may arise. As to the jurisdiction of the Court there can be no doubt after the case of *Ex parte Cowan (a)*.

Mr. *Montagu* and Mr. *Ching*, for the assignees, relied on the danger that would arise from the exposure of their evidence in support of the indictment, and the delay of which the petitioner had been guilty of in presenting his petition until so long after the goods were seized.

Cur. adv. vult.

November 15.

ERSKINE, C. J.—This is an application by *Samuel Heath* for an order upon the assignees of *John Heath*,

(a) 3 Barn. & Cress. 123.

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HARRIS.

a bankrupt, to deliver up goods seized by the messenger, but alleged by the petitioner to be his property, and not the property of the bankrupt. The facts, as stated by the petitioner, present a case which, if true, calls, not only for restitution of the goods, but for ample compensation in damages for a most glaring abuse of the process in bankruptcy; and if made out by proof, before a jury, would no doubt ensure the complainant the fullest remuneration. Our interference, however, is sought, not for compensation, but for the prevention of further injury. The answer suggested by the assignees, but not brought to issue before the Court by affidavits, is, that the goods seized were in reality the property of the bankrupt, and were in the possession of the petitioner for the fraudulent purpose of withdrawing them from the creditors of the bankrupt, and that an indictment having been found by the grand jury against the petitioner and others, for a conspiracy, the object of this petition is to compel the assignees to disclose the evidence by which the criminal charge is to be supported. A disputed title to the goods, therefore, forms the basis of this application. And the real question before the Court is, whether it will *now* compel the assignees to enter into the discussion of their disputed title, or leave the complainant to his ordinary remedy at law. The counsel for the petitioners insists upon his right to have that question settled here, that he may, by the restitution of his property, avoid the injury for which pecuniary damages would afford him no adequate compensation. That this Court has the power to investigate the title of the assignees, and to order restitution, if under all the circumstances it felt itself called upon to interpose,

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I entertain no doubt; but that it is at all events bound to institute the inquiry, is a proposition to which I cannot accede.

To arrive at a clear view of this point, it is material to remember whence this power is derived. It is not, as in other Courts in Westminster Hall, derived from any general jurisdiction over questions of tort, which would entitle any man who fancied himself aggrieved at any time, not prohibited by statute, to come and claim redress for a supposed injury. But it arises incidentally out of the superintendence and control in matters of bankruptcy transferred to this Court, by virtue of which it exercises a summary and discretionary jurisdiction over all the parties to proceedings in bankruptcy, and especially over assignees as officers of the Court. The main object of the bankrupt laws, which this Court is constituted to administer, has ever been the prevention of frauds by bankrupts, and the fair distribution of their property amongst their creditors. But in the administration of those laws, the Lord Chancellor has incidentally interposed, even upon the application of strangers to the commission, to prevent injury from the abuse of the powers conferred by those laws, and to afford an instant remedy where justice could only be secured by his summary intervention. The case alluded to at the bar (a), where the restitution was ordered of short bills and other property in the possession of the bankrupt, present familiar instances of such interposition. And on the same grounds this Court would exercise similar jurisdiction, even when the title to property may be the question in issue. But in thus interposing its extraordinary pre-

(a) *Ex parte Cowan*, 3 Barn. & C. 123.

tection, the Court is bound to take care that it is not made instrumental in defeating the object it was established to promote; and therefore, when there is reason to suspect that its interference is required not for the *bonâ fide* purpose of preventing an injury, but with the view to obtain some indirect advantage in the investigation of imputed fraud against the bankrupt laws, this Court is called upon to pause, and to ascertain the honesty of the purpose for which its interposition is claimed, and the inefficiency of the redress afforded by the ordinary legal remedies, before it incurs the risk of interrupting the course of public justice.

The real question, therefore, is not one of jurisdiction or of right, but of discretion; and it is necessary to examine the facts of the case to ascertain whether the Court in the exercise of a sound discretion ought now to compel the assignees to enter into the discussion of their title to the property in dispute. The fiat was issued in August last, the seizure complained of was made on the 8th of September; on the 10th of that month an indictment was found at the sessions for a conspiracy, which might have been tried at the following sessions, but was removed by certiorari by the defendants into the King's Bench, and now stands in the paper for trial; and no application was made to this Court till the 28th of October. Now, although neither the delay of the application, nor the pendency of the indictment, nor the removal of it by certiorari, would of themselves present any bar to the remedy sought by this petition, they afford a strong ground for suspicion that the object of the petitioner is not the prevention of an irremediable injury. To prevent the injury to his trade, he should have applied *at once* to

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restrain the removal of the goods, or to have them replaced; to prevent the injury to his credit, he would have courted an early inquiry into his conduct; whereas, now, the injury to both must be extensive, and an action of trespass can alone procure for him a sufficient redress. When, therefore, looking at all these circumstances, and the nature of the goods, it is obvious that restitution would afford very inadequate redress, and yet we find the petitioner willing to substitute it for the only efficient remedy for the injury sustained, I am far from being satisfied, either of the honesty of the purpose for which our interference is sought, or the urgency of any impending injury which it would be our duty to prevent. I am of opinion, therefore, that this petition should stand over until the indictment shall be disposed of, without any prejudice to the petitioner's proceeding at law as he may be advised. And if it is thought desirable that in the interval any direction should be given relative to the custody or sale of the goods, the Court will attend to any suggestions that may best tend to secure the interests of the parties.

Sir JOHN CROSS.—I cannot bring my mind to yield to this application on the part of the respondents for delay. I think it both unreasonable and irregular. It is true, this is not the ordinary course of proceeding, but I trust it will soon become so, for it is the cheapest, the most expeditious, and the most effectual course. That this Court has jurisdiction to order restitution in such cases, there can be no doubt, after the judgment of the King's Bench in *Cowan's case* (a). And Lord *Tenterden* there says, “that a petition in bankruptcy is *festinum remedium*, and contributes not less to the

(a) 3 B. & C. 123.

saving of expense, than to the saving of time. The proceeding under the commission operates by way of sudden seizure of property belonging or supposed to belong to a bankrupt. A process so speedy and summary requires to be controlled by a speedy and summary course of relief."

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In the present case it appears that the petitioner's brother having become bankrupt, the assignees have seized the whole stock in trade of the petitioner, to the value of 1600*l.*, on some pretence of title, which they decline at present to disclose. And they insist that his petition for the restitution of his stock in trade and his occupation ought not now to be heard; first, because it is too late; and, secondly, because it is too soon. Too late, for it was preferred six weeks after the indictment; and too soon, for it ought to await the event of the criminal prosecution. But six weeks during the long vacation was no unreasonable time for preparing his petition, considering that he has been also occupied at the same time in procuring his discharge from custody on bail, and also in preparing his defence to the indictment. I think, therefore, it is not too late.

But again it is said, that the petitioner is not really seeking to recover his property, his only object being to bring on a premature disclosure of the evidence for the prosecution. I cannot, however, think that it becomes this Court to lend itself to the concealment of such evidence. If the petitioner had brought his action in a Court of law, an application to put off the trial of the cause, on the ground of the pendency of the indictment, would not have been listened to. And if the petitioner had been carried in the first instance,

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—
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as he ought to have been, before a justice of the peace, he must have been confronted with the evidence now so anxiously desired to be concealed. Indictments for conspiracy, especially those preferred behind the back of the accused, are too often used for improper purposes, and ought not then to be encouraged. If on his trial, the petitioner should be taken by surprise with evidence which he is not prepared to meet, the Court of King's Bench may, for that very reason, set aside a verdict against him; so little is the advantage of concealment estimated there.

It is not even suggested that the prosecution relates to the goods now in question, and I am not aware that it is the duty of assignees to carry on criminal prosecutions, at least unless for offences against themselves in the execution of their office (a), much less to interrupt the proceedings and divert the funds of the estate for such a purpose. If the goods belong to the assignees, it is their duty to dispose of them without delay for the benefit of the creditors; if to the petitioner, they ought as promptly to restore them; and if the right be doubtful, to lose no time in settling the dispute, by this inquiry. In every view, therefore, it appears to me, contrary to the duty of the assignees to apply for delay, and of the Court to allow it.

Sir G. ROSE.—I am at a loss to understand the grounds on which this petition calls upon us, as a matter of right, to interfere; or upon what jurisdiction a stranger to the bankruptcy can require this Court to try an adverse question of property with the assignees,

(a) See the expressions of the Vice-Chancellor in *Ex parte Lewis*, Buck, 237.

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the method of doing so being, as I conceive, either by an action of trover, or by a bill in equity for an injunction and specific restitution; resolving itself again, most probably, into the parties being left to decide disputed property in a chattel before a jury. Under the former law in bankruptcy, the Court always refused to entertain a litigated question of this nature. The answer invariably was, it is a mere case of trover—bring your action; and I certainly do not understand that the late statute has given any additional jurisdiction of the nature now contended for. The jurisdiction that we have is properly exercised in controlling the due administration of the bankrupt's estate, according to the due course of law; although I do not mean to say, that in a clear case, or in a case of waste or irreparable mischief, we ought not to interfere;—I think we ought:—the Chancellor was always in the habit of doing so upon the ordinary principles applicable to injunctions. But what I mean to say is, that where the assignees, as in this case, assert a legal title to the property, the Court has always declined to assume the investigation to that title, or to deprive them of their right as creditors to try a question of property in the Courts of the country, merely on the ground that as assignees they were officers of this Court. The relief therefore sought by this petition cannot be founded on any absolute right to an order, but must rest solely as an application to our discretion. Now in the application of this discretion, it is very probable that we may err in this instance as in others; but my opinion is, that a party ought not to be listened to, except on the ordinary claims to summary interference—that is, unless he has been prompt in his measures to obtain relief, or

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unless the non-interference would be attended with irreparable consequences. Where a messenger entered the house of a third party, and seized goods not belonging to the bankrupt, and the party applied to have those goods restored, coming even promptly, what said Lord *Eldon*? he disclaimed the jurisdiction (a). Nor, unless under the exception stated, did I ever know the Court go farther than merely to the protection of the property, *until* the title to it could be established in a suit or action. I am not aware of any instance where the jurisdiction of the Court in bankruptcy has been exercised, or even supposed to exist, in a manner sought for by the present petitioner. *Ex parte Cowan* (b) certainly does not go that length, and the *Boldero* cases are directly within the exception which I have noticed; for, first, they were instances where the parties came immediately; and secondly, where, if the Court had not interfered, the consequence would have been irreparable mischief. Damages, which no action at law could have set right or compensate in that memorable crisis of 1810;—if the Court had not interfered to try the specific question of title to the short bills, the ruin of all the country bankers, would have been the probable, if not unavoidable consequence of that of their London correspondents. Even in that case, what said Lord *Eldon*? “As those parties are strangers to the bankruptcy I cannot interfere;” and the petitions stood over for amendment by stating the circumstances, in respect of which the jurisdiction over matter might be acquired. I am, however, more inclined to consider those cases as standing upon the necessity of summary interference, at the instance of parties promptly

(a) *Ex parte Craggs*, 1 Rose, 25.

(b) 3 Barn. & C. 123.

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making the application, than on any formal allegation in the petitions. The case before us does not however warrant the anticipation of such irreparable calamity. The goods are as valuable now, at least, as they have been a month ago, the time when an earlier application might have been made to this Court; or as they will be a month or two hence, after the indictment shall have been tried. This, therefore, cannot for a moment be regarded as a case where irreparable injury will be incurred by leaving the parties to the ordinary tribunals, and is very distinguishable from the *Boldero* cases not only in that, but also in another very material point—for here we have the fact of great, and, I must say, very suspicious delay. Why did not the petitioner apply to this Court when it was sitting on the 27th September, or even at an earlier date, when he might on any given day have made his application to the judges; or why did he not apply to one of the judges in equity for an injunction, which he might have done at any time? Neither of these courses has he pursued, and I feel warranted in saying, that the neglect is sufficient to induce the Court to pause ere it exercises this summary and wholly discretionary jurisdiction. I am satisfied no injury will follow the delaying this petition; and I cannot but think that the object of it is more closely connected with the defence on the indictment, than with the benefit to be derived by the immediate restitution of this property: and looking at it in the light of a competition of mischiefs, on the one hand is to be considered the duties which assignees owe to the public in detecting fraudulent appropriations of the property of bankrupts; and on the other hand, the continuance of an alleged injury, which has been so

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HEATH.**

long submitted to by the petitioner, that he himself furnishes the observation, that much more injury cannot well happen by a little still further delay. Then again, looking at the advantages of an examination of witnesses on a trial at law, over the mode in which this Court proceeds by affidavits merely, no one can doubt but that the benefit of creditors should preponderate; and the more especially where so many other Courts are open, in which, by due course of law, the petitioner, if he can establish the very strong case his counsel have stated before us, is sure to recover much more adequate compensation for the injuries alleged to have been sustained, than any that can be accomplished here by the mere restitution of his property. I therefore concur with his Honor the Chief Judge.

The order was, that the petition should stand over till after the trial of the indictment, without prejudice to any proceedings the petitioner might take at law, and with liberty to the parties to apply, &c.



**Ex parte WILLIAM MILLER CHRISTY, ISAAC LLOYD,
JOHN KENYON WINTERBOTTOM and JOHN WORSLEY.
—In the matter of THOMAS BARROW and GEORGE
GEDDES.**

1832.

September 27.
November 8 and
22.

THIS petition first came on for hearing on the 27th September last, when the counsel for the petitioners were heard in support of the petition. The Court did not feel it necessary to hear the arguments for the respondents, and took time to consider their judgment. On judgment being moved for on a subsequent day, their Honors expressed their desire to hear the arguments on both sides, and the petition therefore came on again on the 8th November.

B. & C. being indebted to A. give a joint and several bond. A. takes (as part of the same security) a joint warrant of attorney and enters up a joint judgment. B. & C. become bankrupt:—Held, that the bond is merged in the judgment, and that A. can only prove against the joint estate of B. & C.

The facts on which the petition rested were as follows:—In September 1828 a commission of bankruptcy issued against the above bankrupts. On the 28th March preceding, by a bond, the bankrupts (being partners together) became *jointly* and *severally* bound to the petitioners in the penal sum of 14,000*l.* This was intended as a security for a floating balance against the bankrupts, not to exceed 10,000*l.* On the same day they executed a *joint* warrant of attorney in favour of the petitioners. But the bond and warrant of attorney seemed, and were in fact, contemporaneous parts of the same transaction. On the 12th April 1828, a *joint* judgment was signed against the bankrupts on this warrant of attorney. At the date of the commission 10,000*l.* was due to the petitioners. Proof was tendered to this amount upon the bond against the *separate estate* of *G. Geddes*, but the Commissioner rejected the proof on the ground that the *joint* judgment on the warrant

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of attorney had extinguished the debt on the *joint and separate* bond, which was a lesser security; but liberty was given to prove against the joint estate of the bankrupts.

The petition prayed for liberty to prove against the *separate* estate of *G. Geddes*.

Mr. *Swanston* and Mr. *Montagu* for the petitioners. The intention of the parties was not, in giving the additional security, to limit the prior rights which the petitioners had acquired under the bond. There is no rule of law which establishes the merger or extinguishment of one remedy in another, unless the higher security, which is acquired subsequently, gives to the party obtaining it every advantage he possessed under the lesser security. It is not disputed that according to *Higgen's* case (a), a man cannot have an action on the bond so long as the judgment recovered on it remains in force; from this, however, we are warranted in the conclusion, that the bond is not absolutely merged, but only rests in abeyance; and if the judgment becomes, from any cause whatever, inoperative, the bond may be again resorted to. Thus, in the present case, bankruptcy has rendered the judgment unavailable, and therefore we are entitled to resort to our original remedy on the bond. But modern cases carry this principle still further; thus, in *Drake v. Mitchell* (b), where one of three joint covenantors gave a bill of exchange for part of a debt secured by the covenant, on which bill judgment was recovered, it was held, that such judgment was no bar to an action on the covenant against the three, such bill, though stated to

(a) 6 Coke, 44 b.

(b) 3 East, 251.

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have been given for the payment and satisfaction of the debt, not being averred to have been accepted as satisfaction, nor *to have produced it in fact*. The same principle is contained in the cases of *Ex parte Peacock* (a), *Ex parte Ladbroke* (b). The judgment is in fact only a security for, and no extinguishment of, the original debt. Where the higher security is equally beneficial with the lower remedy, there indeed the latter merges, but not otherwise. The facts also warrant us in this case in referring to the intention of the parties. The bond and warrant of attorney were executed on the same day; and it would be absurd to suppose that the intention was to limit the remedy that was given by the bond on which the additional security of the warrant of attorney was founded. Again, the case of *Twopenny v. Young* (c) shows that unless the higher remedy is co-extensive with the lower, it does not work a merger; and also that the intention of the parties is to be regarded, *Solly v. Forbes* (d). In the present case the judgment is no security whatever, as bankruptcy puts an end to all the remedies to be gained by it. We stand, as respects the judgment, in no better plight than a simple contract creditor, *Ambrose v. Clendon* (e). [Sir G. Rose. In that case the bond was taken after the act of bankruptcy, and was therefore void in toto, which makes all the difference.] We rely on the words used in Lord Hardwicke's judgment, "As to the second question," he says, "I think this petition is sufficient to support the commission, and

(a) 2 Glynn & J. 27.

(b) 2 Glynn & J. 81.

(c) 3 B. & C. 208. Bayley's J. judgment. (d) 2 Bro. & B. 38.

(e) 2 Stra. 1042. S. C. Lee's Cases temp. Hardw. 267, edit. 1770, better reported.

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that the acceptance of the bond is not an extinguishment of the debt as to this purpose; for the only question now is, whether there was a debt subsisting sufficient to support the commission, and not of what effect it is with regard to the bankrupt himself; the reason why it is an extinguishment with regard to the party, is because the bond is a debt of a higher nature; but in this proceeding both debts are the same; and it is every day's practice, that if a creditor by simple contract should, after an act of bankruptcy committed, get a judgment confessed by the bankrupt for the same debt, and take the bankrupt's goods in execution, if the assignees bring an action of trover against that creditor to recover, yet that very creditor is afterwards admitted to come in and prove his debt under the commission, notwithstanding his acceptance of the judgment after the bankruptcy, and he comes in, in that case by force of his simple contract debt; for all creditors are entitled to relief under the commission; so that with regard to the commission he is still considered a simple contract creditor; therefore I think the acceptance of the bond has not, as to this proceeding, extinguished his simple contract debt, so that I think the commission is well founded." In administration of assets in bankruptcy, the same gradations which exist in the general administration of assets as to the priority of specialty to simple contract debts, are altogether disregarded and totally cease. And it is sufficiently established that a specialty creditor in bankruptcy gains nothing in advantage over the simple contract creditors. Such being the case, the higher security, instead of being more beneficial to the creditor, as it ought in its nature to be, becomes wholly inoperative and virtually

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a nullity. Again, the object and intentions of the parties ought, as this Court is also a court of equity, to be looked to; and in so doing, it is obvious that the higher securities taken on the same day, could not be intended to diminish the rights of the parties.

The foundation of every creditor's right of proof is contract with the debtor. In this case it refers us back upon our joint and several bond. [Sir J. Cross. I think you carry your doctrine too far. Suppose the judgment be recovered in an action for a tort or for trespass, can that be termed the offspring of contract?] Even in that case it is contract, namely, of that nature, which, in the eye of the law, every man tacitly enters into with his country to submit to the law of the land, in order to secure reciprocal protection by the same source, *Robinson v. Ball* (a). However, be that qualified as it may, still in *this* case contract is the foundation. [Sir G. Rose. The whole question, in this way of looking at it, is, the nature of the contract at *the time of the act of bankruptcy*.] The contract is for a joint and separate security. The securities which were given in addition to the ~~the~~ bond were merely collateral, and were not intended to destroy the original security. This is, therefore, solely a question of contract. We contend, that the bond is still in force, although the other side suggest that it is merged. We admit that no other action could be brought; but that is not here the question. The effect of the judgment is gone by the bankruptcy, for the petitioner can gain no benefit over simple contract creditors; and the Court well knows, that although the execution taken out on it must be in form *joint*, yet he might execute it against the

(a) 2 B. & C. 762.

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separate property of either. But bankruptcy intervening, such remedies to the parties on the judgment are gone. Therefore is the judgment virtually at an end, and the bond revived entitling the petitioners to all the remedies thereon of proof against the joint or *separate* estate, as though the judgment had never existed. For these reasons we contend, that we are entitled to prove on the original bond against the *separate* estate of *G. Geddes*, and that the judgment, even if it were now effective, is only meant to operate as a further security.

Mr. *Anderdon* and Mr. *Bacon* for the respondents. The parties have themselves materially varied their primitive rights in this case. Originally this was a *joint* partnership debt; they then take a *joint* and *several* bond with a concurrent *joint* warrant of attorney. Had they taken a warrant of attorney conformable to their rights on the bond, it would have been different, and they might have obtained a *joint* and *several* judgment; but instead thereof, they have by their own acts destroyed the effect of their joint and several bond. They have elected, and are bound (a). This is not a case of collateral security, but a security given by the same parties, founded on the original bond. As to merger, it is quite manifest that taking a judgment vacates the bond, *Basset v. Wood*(b). And we contend that the petitioners cannot revert to the bond, even presuming that the judgment has become vacated by the bankruptcy. The dictum of Lord *Hardwick* in *Ambrose v. Clendon* cannot be relied on; it is at best extra-judicial, going far beyond the case decided. So,

(a) 1 Saund. 231.

(b) Litt. Rep. 17.

Ex parte Peacock and *Ex parte Ladbroke* are mere cases of election.

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Mr. Swanston in reply. Is the creditor's situation to be made worse by the bankruptcy of the debtor? At least the petitioner ought to be allowed his right of election. At law, it is clear that a judgment merely joint, would not vary the rights on this bond, because of the manner in which the execution might be executed. Why then, in the absence of all authority, should the creditor be deprived of every benefit he can derive from the securities he has taken? The judgment, owing to the bankruptcy, gives him no benefit of preference over other creditors; his right of separately executing it, is gone; and yet it is said his remedy on the bond is extinguished, and he has no right of electing. It was the old custom when judgment was obtained on a bond to impound the latter, and in case the judgment became in any way defective, the bond was at once placed in statu quo. So should it be in the present instance.



Cur. adv. vult.

The COURT delivered their respective judgments in the following order:—

Sir G. ROSE.—The doubts, which for a while occupied the mind of one of the Court, being at length removed, I am glad to announce that we have come to the unanimous opinion, that this petition cannot be sustained. In this case, *at the time of the bankruptcy*, the petitioners were creditors under a joint judgment:

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and if the prayer of this petition were granted, a benefit would be given to a joint judgment which cannot be given in bankruptcy. It is merely necessary to direct attention to the distinction between the effect of a judgment as *process* affecting *the parties* by force of the record, and its effect against the assets, or as regards the creditors under the commission. If the parties prefer to abide by their judgment, as process, they may do so: but if they come in under the commission, they must come in subject to its rules; and as this is a joint debt, the separate creditors are entitled to say, you shall not prove against the separate estate till the separate debts are all paid off, unless there is a surplus:—We, the separate creditors, are postponed in proof against the joint estate; you, therefore, a joint creditor, cannot prove against the separate estate until we are satisfied.

Upon the point of merger little need be said. If the security of a bill of exchange, or an ordinary bond, or a statute staple, be acquired, still the debt remains merely simple contract. If judgment be obtained there is an end of all prior contract; and for this reason, that the courts will not allow parties to be harassed by suffering a creditor to resort back to the lesser security, on which he can, by following the course of law, only return to a judgment. The lesser security is merged in the record of the Court, being as it were brought there by profert. In *Ambridge v. Clendon*, the whole question was, whether the petitioning creditor's debt was sufficient to sustain the commission. It was not doubted that a simple contract was merged in a specialty debt; the ques-

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tion being, was there a debt at the time of the act of bankruptcy? At *that time* there was a simple contract debt; for the judgment having been obtained afterwards, was virtually out of the question. And upon this view of the subject Lord *Hardwicke's* observations were founded. *Ambrose v. Clendon* may be compared to this case: Suppose a creditor to the extent of 100*l.* receives that sum *before bankruptcy*, there can be no doubt that this is a perfect extinguishment of the debt: but if he receives such *payment* after the act of bankruptcy, as in the case of *Mann v. Shepherd* (a), the payment is void; and it does not preclude him from suing out a commission, the original debt remaining in force. So, if a bill of exchange be taken, or a judgment be entered up after the act of bankruptcy, generally speaking, in bankruptcy both are void, as in the case of *Ambrose v. Clendon*. It has been argued that the effect of the process ought to be regarded in this case; as for instance, that as the effect of joint execution would be to induce a remedy against each separate estate, so in bankruptcy a right of separate proof ought to exist. But the answer is obvious; the former is a process of law, the latter an equitable mode of administering the assets of an insolvent trader, giving equal advantage to all the creditors, whether they are such by simple contract or by specialty. So much as to the law;—and now as to the equity, upon which the case has been put; but I cannot see what *equity* the petitioners can have against the separate estate; for let it be remembered that this debt in its *origin* was *joint* only: and if we are to go

(a) 6 T. R. 79.

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back, we must look at the whole transaction. The petitioners cannot in justice be allowed to say, "We will stand by a particular part of the transaction." If they go back at all they must go to *the original* debt, that was joint.—I therefore think this petition must be dismissed.

Sir JOHN CROSS.—In this case there are three questions arising for our consideration:—1st. The existence and effect of the alleged merger. 2d. The legal effect of a joint judgment in respect of the remedies on it. And 3d. The effect of bankruptcy on such joint judgment, and how far the party is entitled to resort to his original remedy.

With respect to the first, there never was a doubt but that the remedy on a bond merges in the judgment founded on it. But the petitioners contend that it is open to them to show that, under the circumstances of this case, it was the intention of the parties that all the securities taken by them were meant to subsist co-extensively and concurrently, and two cases are cited in support of this proposition. The one, *Solly v. Forbes* (a), in which a release was given by the plaintiffs to *A.*, one of two partners, with a provision that it should not prejudice any claims which the plaintiffs might have against *B.*, the other partner; and that in order to enforce the claims against *B.*, it should be lawful for the petitioners to sue *A.* either jointly with *B.* or separately. In an action by the plaintiffs against *A.* and *B.*, this release having been pleaded by *A.*, and set out on *oyer* in the replication, with an averment that the action

(a) 2 Brod. & B. 38.

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was prosecuted against *A.* jointly with *B.*, for the purpose of enabling the plaintiffs to recover payment of monies due from *B.* and *A.* to the plaintiffs, either out of the joint estate of *B.* and *A.*, or from *B.* or his separate estate, the replication was demurred to, and the demurrer over-ruled. Another case is that of *Twopenny* and *Young* (*a*), in which *B.* being indebted to *A.*, procured *C.* to join with him in giving a joint and several promissory note for the amount; and he, having afterwards become further indebted, and being pressed by *A.* for further security, by deed (reciting the debt, and that for a part a note had been given by him (*B.*) and *C.*, and that *A.* having demanded payment of the debt, *B.* had requested him to accept a further security,) assigned to *A.* all his household goods, &c. as a further security, with a proviso that he should not be deprived of the possession of the property assigned until after three days' notice. It was there held that this deed did not extinguish or suspend the remedy on the note, but that *A.* might, notwithstanding the deed, sue *C.* at any time. From these the petitioner contends that the intention is to be regarded, and that the intention in this case appears to be that the bond should not merge, but merely that the warrant of attorney and the judgment should be taken as a further security. Then it becomes purely a question of fact as to the intention, and on looking into the instrument itself I should rather presume a contrary intention. The term there used is a "better" security, which would imply a higher security rather than a "further" security merely; which, in my mind, does away with the question of intention altogether. I am certainly of

(a) 3 B. & C. 208.

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opinion, however much I had doubted on this point before, that the joint and several bond did merge in the joint judgment, but at the same time the bond is alive to many purposes still. Merger, in my mind, is a mere term of art, to which different significations may be attached, and it is not an absolute final extinguishment; as, if the judgment is bad, the debt, on which it is founded, is revived. Thus it was in *Higgin's case*, there the debt was held not to be absolutely extinguished, although no fresh action could be brought in the mean time.

As to the second point—at the time of the bankruptcy the debt was upon a joint judgment, and before the bankruptcy that judgment would clearly have been an answer to any question that could be raised on the bond or on the original debt. The legal *effect* of a joint judgment is certainly to give a joint or a separate remedy; though at the same time the parties must be sued jointly. In bankruptcy a different rule at once steps in, and the law then says that joint debts and securities shall come against the joint estate and effects, and separate debts against the separate estate. If this had been a joint debt on contract only, the creditor clearly could only prove against the joint estate, and the question in my mind has been, whether for such purposes a judgment was within that rule. I had thought that judgments might form an exception to that rule, and that a joint judgment creditor might be allowed to seize all that he could in law independent of bankruptcy, namely, joint or several property. On a joint contract no such doubt could exist, and I own that my mind has paused considerably on consideration of this part of the case. However, as there is no reported

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decision either way to warrant the making any exception in favour of a joint judgment, I do not feel authorized to differ from my learned colleagues in the absence of all decisions on the subject.

3d. How far the petitioners are entitled to resort to their original remedies under the bond. The virtues of the judgment being gone, by the bankruptcy the parties are placed in a worse plight than when they merely held the security of the bond. This also has placed an obstacle in my way that I have found very difficult to get rid of.

In *Bryant v. Withers* (a) Lord *Ellenborough* said, that he did not find that Lord *Hardwicke's* judgment in *Ambrose* and *Clendon* (b), proceeded on any such distinction as that taken by *Holroyd*, (*viz.* that the bond was the voluntary act of the party, and the creditor taking it might avoid the bond and resort back to his prior debt,) but it was founded upon this, that although the bond was an extinguishment with regard to the bankrupt himself, because it was a debt of a higher nature, yet, in the proceeding under a commission of bankruptcy, both debts are the same.

The petitioners say that now both remedies are placed on a par, and therefore they have a right to resort to the bond, and prove against the separate estate of one of the obligors.

Here again no authorities exist to warrant my differing in opinion, although I have still very considerable doubts on the subject, and more especially when I look to the words of the 59th and 108th sections of the 3 Geo. 4. c. 16, which considerably bear upon the questions in this petition.

(a) 3 M. & S. 181.

(b) Lee's Ca. temp. Hardw. 268.

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and others.

On the whole, although not without considerable doubts and reluctance, I concur with Sir *G. Rose* in the judgment that the bond is merged, and that the petitioner is therefore not entitled to prove against the separate estate, and that this petition must be dismissed.

ERSKINE, C. J.—I am also of opinion that this petition must be dismissed. I am glad to find that the opportunity we have had of conferring together on this case has left so little difference of opinion on the bench that the unanimity of the judgment of the Court is not interrupted.

The question in this case arises out of the peculiarity of the rules established in bankruptcy for the distribution of the effects of insolvent partners. It is true, as has been already stated, where there is no bankruptcy, a joint creditor may pursue all his debtors to judgment, and under that judgment may seize the joint property of all, and also the separate property of each. By the intervention of a commission of bankrupt, the joint creditor is confined in the first instance to his proportion of the joint effects, and can only reach the separate property of his bankrupt debtor in case there should be a surplus after all the separate creditors are paid. If he have a joint and several security, he has the additional privilege of electing whether he will take his share in the character of the separate creditor of each, or as the joint creditor of all.

The simple question, therefore, in this case is, what was the nature of the petitioner's debt at the time of the fiat issuing. If it was a joint debt, he can only prove it against the joint estate; if it was then a joint and several debt, he may elect to prove it against the

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separate estate: and the prayer of his petition is, that the petitioner insists that his debt is joint and several. 1st. Because the debt secured by the judgment is in its nature several as well as joint. 2d. Because he has a right to prove upon the bond, without reference to the judgment. I am of opinion that the debt contracted by the judgment is in its nature joint, and must be followed by all the consequences belonging to a joint debt: and further, that the separate remedy given by the bond was merged and lost in the judgment, so that the debt which, by virtue of the obligation, was joint and several, became changed by the judgment into a joint debt only.

Upon the first point it is material to see what are the ordinary consequences of a judgment in debt upon a joint obligation. 1st. The execution must be joint; it may be brought to bear upon the several persons and separate properties of each defendant, but the original process must be joint. Again, if one of several obligors die after judgment on a joint action, his assets cannot be reached by the obligee; whereas under several judgments against joint and several obligors, the obligee may pursue his remedy against the representatives of each.

Again, if an action be brought upon a judgment in debt against several parties, it must be brought against all, even where the original debt was several as well as joint. It is clear, therefore, that at law a debt secured by a judgment against several, is treated as the judgment debt of all.

But it is said, that inasmuch as, but for the bankruptcy, the petitioner might have levied his debt under the judgment against the separate estate of each, as

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Chaisty
and others.

well as against the joint estate of both, he ought not to be placed in a worse condition in that respect under the bankruptcy than he would have been if his debtor had continued solvent. But this argument, if good for any thing, would entitle him to prove against the joint estate of all as well as against the separate estate of each, which is not even contended for. It is an argument in fact that strikes at the general rule itself, and affords no clue for its application to this particular case, and was urged in the case of *Ex parte Rowlandson (a)*, when the rule of election was first established by Lord Talbot; for every joint creditor is placed in a worse condition by the bankruptcy in proportion to the advance that he had made in pursuing his remedies at law. They are all compelled in the first instance to resort to the joint estate alone, and can only reach the separate estates of their debtors after the separate creditors are paid.

But then the petitioner claims to be remitted back to the option which he would have had even in bankruptcy upon his joint and several bond, and to exercise that option now by proof against the separate estate. The answer to this claim is, that he has already exercised that option by signing judgment in a joint action upon the very security under which he now claims to prove his separate debt. It is not denied that at law the recovery of a joint judgment would for ever preclude the obligee from suing on the separate obligation; but it is said that the reasons given for such a rule at law do not apply to the case of proof in bankruptcy, and therefore that this question ought not to be affected by that rule. It is true that some of the reasons do

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 Ex parte
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 and others.

not apply, but all are not inapplicable; and I think in this, as in all other cases of proof not specially provided for by the legislature, we must look at the rights of the parties as they stood at the time of the commission, and then apply to those rights the remedies prescribed by the bankrupt laws. What was the position of the petitioner with respect to his debt at the time of the fiat? His original debt was joint. As a security for that debt he had obtained a joint and several bond, and also a joint warrant of attorney. Before he took any steps upon that bond, he had at his option a right of action against both or either. Before the fiat was issued he pursued his remedy to judgment upon the joint obligation. It is immaterial whether he did so under the warrant of attorney or the ordinary course of hostile litigation. What was then his legal position? His remedy was wholly confined to the judgment, the duty (to use Lord *Coke's* language) being changed into another nature, and he must follow out that remedy according to the rules prescribed. The case of *Ambrose and Clendon* was much relied upon at the bar, but does not appear to me to deserve the weight ascribed to it, for the reasons already given by Sir *George Rose*, to which I need not again refer: and the same observations apply to *Bryant v. Withers* (a).

I have looked carefully through all the other cases cited at the bar, but I forbear commenting on them now, because, for the reasons which I gave at the time, they do not appear to me to bear directly upon the point.

The question here does not arise, as in many of them, upon the effect to be given to a collateral secu-

(d) 2 M. & S. 123.

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CHRISTY
and others.

ity, but upon the effect of a judgment recovered upon the identical security under which it is now sought to prove the debt; for, independently of the bond, there is not, nor ever was, any separate debt. The debt was really a joint debt, though for the better securing the money the creditor had obtained a joint and several bond, which gave him the option of treating it as a joint and several debt at his pleasure. He has not chosen to avail himself of his separate remedy—he has not chosen to leave his option still open—but has, by entering up judgment upon the joint obligation, fixed and concluded his status as a creditor before the bankruptcy; and to his condition thus fixed we must, I think, apply the rules of distribution adopted in cases in bankruptcy, and confine his proof to the joint estate of the bankrupts.

—◆—

Ex parte FREDERICK SAXE.—In the matter of
CHARLES SAXE.

November 23.

The giving up of a business in consideration of an annuity is not such a consideration as can be valued under the 6 Geo. 4. c. 16. s. 54. that section being confined to money considerations.

BY articles of partnership, 17 May 1822, the petitioner, *Frederick Saxe*, agreed to carry on the business of a tailor in Conduit Street, in copartnership with his son, the bankrupt, *Charles Saxe*, for eight years, determinable by petitioner on six months' notice. The petitioner was to take two-thirds profits and the bankrupt one-third. On the 1 July 1827, the partnership was determined by agreement, and the petitioner sold his interest to the bankrupt under the following terms: *viz.* "the balance at the bankers to be transferred to *C. Saxe*: the 1600*l.* money advanced by *F. Saxe*, and

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Saxe.

now employed in the trade as his capital, to be secured as hereinafter mentioned, an account to be made out of the stock in trade, and all outstanding debts due to and owing by the plaintiff up to the 1 July, and out of the balance in favour of the partnership the above 1600*l.* to be deducted, and the surplus to be divided into three parts, one-third to be the property of *C. Saxe* and the other two-thirds to be the property of *F. Saxe*, the amount of such two-thirds to be paid to *F. Saxe*, by four bills of exchange of equal amount, payable, with interest, at nine, fifteen, twenty and twenty-four months after date, drawn by *F. Saxe* on *C. Saxe* and a *Mr. Wm. Fox*. *F. Saxe* to assign his interest in the book debts, stock in trade, lease of the house in Conduit Street, to *C. Saxe*, who is to take the furniture and fixtures (with such exceptions as *F. Saxe* may think proper) at a fair valuation, the amount of such valuation to be added to the 1600*l.*, and which is to be paid with interest to *F. Saxe* by bond or bonds of *C. Saxe* and *Mr. Fox*, as follows:—one-fourth, with interest half-yearly, 1 July 1830; one-fourth ditto, 1 July 1831; one-fourth ditto, 1 July 1832; one-fourth ditto, 1 July 1833. *C. Saxe* to have the lease as from Lady-day last, and be entitled to receive the rent due from Major-General *Calcraft* from 1 March last, and take the premises, subject to the agreement entered into by *F. Saxe* with him, on *C. Saxe's* paying to *F. Saxe* 25*l.*, and paying the quarter's rent and taxes from Lady-day last. In consideration of *F. Saxe* having relinquished the trade in favour of *C. Saxe* and *Wm. Fox*, to secure to *F. Saxe* an annuity for life of 300*l.* payable half-yearly, but in case of his death before 30 May 1830, such annuity to be paid to *F. Saxe's* executors up to

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 ———
 Ex parte
 Saxe.

that time; an annuity of 100*l.* to *Eliz. Saxe* for life, payable half-yearly; such annuities to be secured by bonds of *C. Saxe* and *Wm. Fox*, who are also to indemnify *F. Saxe* in respect of all debts hereafter to be contracted in respect of the said trade. The costs to be borne by *F. Saxe* and *C. Saxe*. We, *F. Saxe* and *C. Saxe* hereby agree to dissolve our copartnership on the within terms; and I, *Wm. Fox*, do hereby agree to join in the said securities on behalf of my son-in-law, *C. Saxe*."

This memorandum of agreement was carried into effect by two several indentures of assignment, dated 28 July 1827. By one of which the petitioner assigned his share and interest in the stock in trade, debts and effects belonging to the said copartnership trade to the bankrupt, and covenanted not to carry on the same trade within six miles of Westminster; and by the other indenture, petitioner, for the nominal consideration of 25*l.*, assigned the lease of the house to the bankrupt, and the bankrupt and *Wm. Fox* as his surety (since dead insolvent) executed four bonds to the petitioner in the penalty of 1146*l.* each, and each respectively conditioned to pay petitioner 573*l.* 5*s.* 6*d.* on the days before-mentioned, amounting in the whole to 2293*l.* 2*s.* being the amount of the valuation of furniture and fixtures. And for securing the annuities to petitioner and his wife, pursuant to the memorandum of agreement, *C. Saxe* and *Wm. Fox* executed their joint and several bond, bearing even date with the other securities, whereby they became bound to the petitioner and his wife in the penal sum of 3000*l.*; whereby, after reciting the former partnership and its dissolution, and that the petitioner had given up his business. to

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Ex parte
Saxe.

C. Saxe, and that, by an indenture of even date, the petitioner, in consideration of 1130*l.* 13*s.* 4*d.* secured to be paid him, had assigned all his share and interest in the stock in trade, debts and effects of the copartnership to *C. Saxe*, his executors, administrators and assigns; and that the said *C. Saxe*, and *Wm. Fox* as his surety, had, in consideration of the petitioner having given up the business to *C. Saxe*, agreed to secure, by their joint and several bond, to petitioner and his wife the said annuities, and to indemnify petitioner against the debts, &c. The bond was conditioned to be void upon payment to petitioner and his assigns, during his life, an annuity of 800*l.* per annum, and in case he should die before 1 July 1830, to his executors, &c. up to that date, and on payment of an annuity of 100*l.* per annum to the wife and her assigns for her life after the death of the petitioner, if he should die after 1 July 1830, with proportionate payments.

Since the date of this bond *Fox* took the benefit of the Insolvent Act. The annuity of 300*l.* was paid to the petitioner up till January 1831, but nothing since; the four bonds for securing the sum of 573*l.* 5*s.* 6*d.* each were wholly unpaid. The fiat issued 1 July 1832 against *C. Saxe*. Proof was tendered, on the 20 July, by the petitioner, for 450*l.* the arrears of the annuity, and for 2246*l.* 8*s.* the value of the annuity and the growing payments thereof, (such value being estimated according to Table I. of the Legacy Act, 36 Geo. 3. c. 52.) and for the further sum of 2067*l.* 5*s.* 2*d.* on balance of accounts for principal and interest due to petitioner by virtue of the four several bonds, and 47*l.* 19*s.* for taxed costs incurred by petitioner in obtaining judgment against the bankrupt upon the said

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annuity bond, and two of the said money bonds on which the petitioner has sued the bankrupt prior to his bankruptcy, amounting in the whole to 4811*l.* 12*s.* 4*d.*, and such proof was received by Mr. Commissioner *Fane* as a claim to be admitted as proof, unless displaced at a private meeting to be called for that purpose.

At a subsequent private meeting the Commissioner allowed for the value of the annuity the sum of 876*l.* only, and gave the following reasons for this judgment:

“ In this case the question is the value of annuity granted by the bankrupt to his father. The difficulty in estimating the value of this annuity arises from this, that the consideration given was not a money consideration, but a consideration itself requiring valuation; for the consideration was the relinquishment of a business. In ordinary cases the mode of estimating the value of an annuity is this. You take the estimated value of the annuity the day it was granted; this is your first sum. You then take the sum actually given; this is your second sum. You then take the estimated value of the annuity at the date of the commission; this is your third sum. Then by multiplying according to the rule of three the last sums together and dividing by the first, you get the result, which is to be proved. The common government annuity tables give the first and third sums; the difficulty is as to the second. To ascertain that I have assumed that the fair average profits of the business relinquished was 600*l.* per annum, Mr. *Saxe* senior's share being two-thirds, 400*l.* a year. Upon the evidence of Mr. *Cafe* it appears, that where the goodwill of a business has been sold, it has generally fetched about three years purchase. But it happens in this case Mr. *Saxe* senior bought part of the business two

years ago of Mr. *Banks*, and gave only one year's purchase. On account of the evidence of Mr. *Banks*, I deduct half-a-year from the three I should otherwise have allowed, and I allow $2\frac{1}{2}$, that is, 1000*l.* as the fair value of the annuity at the time it was purchased. The above principle of calculation being then applied, gives 876*l.* as the sum to be proved."

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Saxb.

The petition prayed that the petitioner might be at liberty to go before the Commissioner and make farther proof against the said estate of the bankrupt, either for the sum of 1370*l.* 8*s.* the amount disallowed by him, or that the value of the annuity might be correctly taken with reference to the original price for the same ; or, without restricting the valuation of such original price, to the mere value of the petitioner's share in the trade ; or upon better evidence of the actual value.

Mr. *Ching* for the petitioner contended, that the petitioner ought to have been admitted to prove against the estate of the bankrupt for the full value of the annuity, according to the ordinary modes of calculating the value thereof. And the Commissioner ought not to have ascertained the value thereof with reference to the price originally given for the annuity ; such price not having been a money consideration or capable of a correct or certain valuation in money ; or if the value of the annuity ought to have been ascertained with reference to the price given for the same, such price ought manifestly to have been calculated with reference to the whole benefits derived by the bankrupt under the agreement, and not merely by a valuation of petitioner's share of the partnership business ; for though the bond for securing the annuity stated the consideration for

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the annuity to be that the petitioner had given up the business to *C. Saxe*, yet the same was in truth only a part of the general arrangement respecting the business between the petitioner and bankrupt; and the petitioner would never have entered into any part of the arrangement except upon the terms of having the annuity secured to him and his wife; and the lease of said house and premises in which the business was carried on, and which upon the face of the assignment was assigned by the petitioner to the bankrupt for a consideration of 25*l.* only, was at that time very valuable. The value of the whole price of the annuity could not be more correctly ascertained than by the estimate the parties to the contract put thereon at the time of granting the annuity, and when there was no reference to or contemplation of the bankruptcy of *C. Saxe*, both the parties being at that time competent to judge of the value of the trade, the bankrupt having for some years previously been a partner therein. In this instance the Commissioner had no right to refer to the consideration at all, it being a case within the principle laid down by Lord *Eldon* in *Ex parte Thistlewood* (a). There is no case to be found in which any other than money considerations have been brought within the calculations referred to in the statute. The act uses the word "price," and it cannot be said that the giving up a business is a "price," however valuable it may be; in fact the consideration itself will require to be valued.

Mr. *Montagu* for the respondent. The case of

(a) 19 Ves. 236; 1 Ross, 290.

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Ex parte
S472.

Ex parte Thistlewood can hardly be said to govern the present question. That decision seems to have been grounded on the peculiar circumstances attending the grant of the annuity, rather than as laying down any general principle. The 54th section (a) does not contain words which warrant the conclusion that money considerations alone are included in its provisions. It is true there may be some difficulty in valuing this consideration, and there are many others in which the same difficulty has occurred, yet the Court will not allow such objection to stand in the way, and will not shrink from the labour of such an investigation, as was observed in the case of *Ex parte Davis* (b), *Ex parte Tindal* (c).

Mr. *Ching* in reply was stopped by the Court.

ERSKINE, C. J.—Prior to the 49 *Geo.* 3. c. 121. if the annuity bond had been forfeited before the bankruptcy, the parties might prove on the bond, having a value set upon the annuity in order to show what was to be recovered on the bond. Under that statute and the 6 *Geo.* 4. c. 16. s. 54. however, the bond need not be forfeited to enable the annuitant to prove for the value of the annuity. The question then is, how is the value to be ascertained according to the words of the latter statute (d)? It is contended, that the word “price” used in the statute, means and is to be extended to “consideration.” But I cannot see the propriety of giving to it so extensive a signification. It refers to “pecuniary” consideration, or to such other

(a) 6 *Geo.* 4. c. 16.(b) 1 *Mont.* 123.(c) *Mont. & M.* 421.

(d) S. 54.

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Saxe.

consideration only as might easily be reduced to a money valuation. Here the consideration is the giving up of the goodwill, and I think that does not come within the term "price." In *Ex parte Fisher* (a) the consideration for an annuity was a lease, and it was there held, that a value might be put on that consideration. But it by no means follows, that because such is the case with regard to a lease, which may be easily valued, therefore all manner of considerations are capable of valuation. I think this is within the ordinary case of an annuity before the 6 *Geo. 4.*, and that in taking its value no regard should be had to the consideration given.

Sir J. Cross.—The word "price" in its legal signification means the "*pecuniary*" consideration, where there is one. If not, no regard can be had to it in valuing the annuity. Although it has been so contended, I cannot agree that price must mean the consideration, however difficult it may be to value such consideration. Suppose this not to be an annuity within the act? Then it stands as before the 6 *Geo. 4.* the bond being forfeited; and the market price of the annuity is that sum for which the penalty stands as security. The commissioner must set a value on this annuity, rebating its value according to the increased age of the annuitant.

Sir G. Rose.—I fully concur. If this does not fall within the 6 *Geo. 4.* then there is a right to prove the full amount of the penalty, subject to be reduced by evidence as to the less actual present value of the

(a) 2 Glyn. & J. 102.

annuity, which is an equity in favour of the bankrupt, as in *Ex parte Whitehead* (a), where it was decided, that the variation in the value from the lapse of time since the granting the annuity, was to be taken into consideration in estimating it.

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The order must be, that proof be admitted for the penalty in the bond, subject to reduction by the decreased value of the life of the annuitant, which must be ascertained by an actuary.

(a) 1 Mer. 10, 127.

—◆—

Ex parte BACON.

MR. RANDALL applied on behalf of a mortgagee for a sale of the estate and liberty to him to bid. It was a case of a legal mortgage, where power of sale was given by the deed. The only doubt in the minds of the assignees was, as to the power of the Court in cases of legal mortgage.

November, 26.

This Court has jurisdiction to order sale of estate legally mortgaged, on application of mortgagee, giving him leave to bid.

Sir G. ROSE.—There is no doubt as to the jurisdiction of the Court in such cases. Such applications are also manifestly for the benefit of the bankrupt's estate, inasmuch as by a sale under the bankruptcy, the heavy duties otherwise chargeable on the transfer of property are saved to the estate.

The other Judges concurring, the Court made the order.

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—
Southampton
Buildings,
December 12.

What affidavit
 necessary of
 residence of
 creditors to
 annul town fiat
 and issue a
 country one.

Ex parte LEONARD and others.—In the matter of
 * * * *.

MR. TAMLYN applied at the instance of the above petitioning creditors, that a town fiat might be annulled, or impounded, and that a country commission might issue in lieu of it. The affidavit in support of the application stated, that “the major part in number of creditors resided at Birmingham, and although the bankrupt resided in London, yet it would be of great saving to the estate to allow this course, rather than that the creditors should have to travel to London, in order to prove their debts.”

The COURT thought that the affidavit was insufficient, inasmuch as the majority mentioned in the affidavit might be produced merely by the smallest difference in amount or value; besides which, the distance was sufficient to entitle the creditors to prove by affidavit, if they thought proper.

The application was therefore refused (*a*).

(*a*) See *Ex parte Johnson*, 1 Dea. & Chit. 221.

Ex parte BOWDEN and ABBOTT, assignees.—In the matter of JOHN BUSH, a bankrupt.

December 13.
 Official assignee cannot, under 1 & 2 Will. 4. c. 56. s. 22., take bankrupt's money out of the hands of a solicitor, without discharging his lien.

THIS was an application by the assignees of the bankrupt, and the prayer of the petition had for its object three things: viz. 1st, to direct the respondent (**Mr. Towne**, who had been solicitor in working the fiat), to

pay over to Mr. *Abbott*, the official assignee, *all monies received by him on account of the estate*. 2d, That he should deliver to the assignees his bills of fees and disbursements *signed by him*, as solicitor under the *fiat*, and that such bills should be referred to the Commissioner for taxation (a). 3d, That he should deliver to Mr. *Smith*, (newly appointed as solicitor in place of Mr. *Towne*) “*all deeds, books, papers, documents, and writings*,” appertaining to the estate (b). The application was resisted by the solicitor, on the ground of his having a lien on the fund and on the above papers, for the amount of his bill of costs incurred in that bankruptcy.

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Ex parte
Bowdler
and another.

Mr. *Swanston* and Mr. *Prendergast* for the assignees. This is a case involving a question of great importance; the principal point being, whether Mr. *Towne*, who, as solicitor for the assignees in this bankruptcy, had recovered monies for the estate, should not, according to the 22d section of the 1 & 2 Will. 4. c. 56., be bound to pay all such monies into the hands of the official assignee, independently of a *lien* (c), which Mr. *Towne* considered himself entitled to, for

(a) As to this, see *Crowder v. Davis*, 3 Y. & J. 433, and 4 Moore & Payne, 869.

(b) It does not appear that any decision has gone so far as to warrant this part of the prayer, as to “*all documents and writings*,” &c. It has, indeed, been ruled that a solicitor shall not retain “*the proceedings*” in a bankruptcy against the interest of the creditors; *Ex parte Tilley*, 2 Rose, 83, n.; *Ex parte Herdy*, 1 Rose, 396; *Saunders and another in re Townsend*, 1 Rose, 275; and see *Ex parte Stirling*, 16 Vesey, 258; and *Lambert v. Buckmaster*, 2 B. & C. 616; S. C. 4 Dowl. & Ry. 125.

(c) As to *lien* in general, both at law and in equity, on monies received by attorney on account of client, see *Welsh v. Hote*, Douglas, 238; and *Williams v. Carmichael*, *ibid.* 101; *dicta* of Lord Mansfield. And also *Turnin v. Gibson*, 3 Atk. 719, judgment of Lord Chancellor Hardwicke.

1832.

Ex parte
BOWDEN
and another.

his costs incurred in bringing an action at law, and for other charges incurred by the assignees in the course of the bankruptcy. We contend, Mr. *Towne* ought at all events to have paid the *balance* due to the assignees, after deducting the amount of his bill from the sum (107*l.*) now in his hands, even if he had any right of lien in this case.

ERSKINE, C. J.—Does Mr. *Towne* object to pay the balance to the official assignee?

Mr. *Duckworth* and Mr. *J. P. Cobbett* for the respondent. There is but a small part of the money on which, as a balance, the assignees have any claim, and that Mr. *Towne* has always been ready to pay.

ERSKINE, C. J.—(without calling on the counsel for the respondents.)—This petition comes before the Court on an erroneous ground. Though the 22d section of 1 & 2 *Will.* 4. appointed the official assignee to be the receiver of money due to the estate, it could not be intended to deprive other parties of such claims as they would before have had against the creditors' assignee. The respondent is called before us, not because he resisted a demand for a *part*, but because he was unwilling to give up *the whole* of the money. It never was the intention of the act to deprive an attorney of his *lien* (a). That could only be to give a per centage on money paid over to the official assignee.

(a) "Affirmative words in acts do not take away common law rights. But where they *in sense* contain a negative, it is otherwise;" Plowden, Comm. 113; which see — and *Griffin v. Egles*, 1 H. Bla. 122.

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Ex parte
BOWDEN
and another.

Sir J. Cross.—If the prayer of this petition were granted, the same rule would apply in the case of a broker or auctioneer, and in that of a carrier; even in the case of a letter sent by the post, containing bills; in which case the assignees receiving the letter might refuse to pay the postage, and insist on the letters being delivered free.


Sir G. Rose concurred.

Mr. *Swanston* hoped that the Court would not require the petitioners to pay the costs; they had been driven to the petition by the Commissioner, who was of opinion that Mr. *Towne* had no right of lien on the money.

ERSKINE, C. J.—If the assignees have proceeded in this petition on wrong advice, that is no reason why the expense thus incurred by them should be paid out of the respondent's pocket. This is an application of a very unreasonable nature.

Sir J. Cross.—It is like taking away the solicitor's lien by the official assignee, and at the same time giving one to himself.

Petition dismissed, with costs to be paid
by the petitioners personally.



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Ex parte MICHAEL GRAZEBROOK, WILLIAM GRAZEBROOK, SAMUEL BAYLIS FARADAY, CHARLES MASON, PHILIP RUFFORD, FRANCIS RUFFORD, JOHN RATCLIFFE the elder, JOHN RATCLIFFE the younger, THOMAS LITTLEWOOD, BENJAMIN LITTLEWOOD, WILLIAM CLARK, JOHN ROSE, CHARLES MADDISON, RICHARD HICKS, JOB MEIGH, ROBERT JOHNSON, ELIZABETH LOWE, JOHN CORMIE, WILLIAM SEAGER WHEELEY, JOSIAH WEDGWOOD, the elder, JOSIAH WEDGWOOD, the younger, FRANCIS WEDGWOOD, HENRY DANIEL, RICHARD DANIEL, WILLIAM BROOKES, EDWARD LANE, THOMAS FARMER, and JOHN FLOWER, Creditors.—In the matter of WILLIAM NAYLOR, Bankrupt.

December 14.

Petition by creditors to expunge proofs, to admit proofs, and to remove assignees, not multifarious, but removal of assignees being refused, petition becomes multifarious.

A. being a dormant partner with B., dissolves partnership, and B. is declared indebted to A. on balance; A. sues B. for balance, and receives cognovit for debt and costs, B. becomes bankrupt:—Held, A. is entitled to prove his debt against the estate, although some partnership debts are unpaid.

IN the month of September 1830, the bankrupt and *Thomas Wills* having been carrying on business together as copartners, dissolved partnership. The partnership was then indebted to various persons to the amount of 5000*l.*; of which was still due to *Jos. Wartnaby*, 1399*l.*; Messrs. *Blakeway & Co.* 300*l.*; Messrs. *Ensell & Co.* 100*l.*; the assignees of *Southgate*, 40*l.*; *John Anderson*, 30*l.*; the Plate Glass Company, 30*l.*; and to the petitioners, *Elizabeth Lowe*, 303*l.*; *John Cormie*, 150*l.*; *Thomas Farmer*, 70*l.*; Messrs. *Grazebrook*, 60*l.*; *William Brookes*, 80*l.* On the 22d October 1832, a fiat was issued at the suit of *Wartnaby* against the bankrupt.

On the 7th November a meeting was held for the choice of assignees, when the petitioners, *Michael* and *William Grazebrook*, proved a debt of 395*l.* 6*s.* 9*d.*; the petitioners, *Philip* and *Francis Rufford*, a debt of

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 Ex parte
 GRAEBROOK
 and others.

159*l.*; the petitioners, *Thomas* and *Benjamin Littlewood*, a debt of 118*l.* 18*s.* 3*d.*; the petitioners, *William Clark & Co.* a debt of 50*l.*; the petitioners, *John Ratcliff*, senior and junior, a debt of 118*l.* 15*s.* 6*d.*; the petitioners, *Faraday* and *Mason*, a debt of 50*l.*; *Thomas Wills* also proved a debt for 2313*l.* although it was objected to by the petitioners on the ground that the joint partnership debts of *Wills* and the bankrupt had not been all paid off. The proof of the debts of the said petitioners and of other persons, (which if admitted would have turned the scale in the choice of assignees), were rejected, and *Wills* and *Wartnaby* were chosen assignees. The petitioners prayed that *Wills*' proof might be expunged and that the rejected proofs might be admitted, and that *Wills* and *Wartnaby* might be discharged from being assignees.

The affidavits in reply, and that of *Wills* in particular, stated that he, *Wills*, was only a dormant partner of the bankrupt, and that upon the dissolution of the partnership the bankrupt, upon a stated account, was found indebted to him in the sum proved. It also appeared that *Wills* had arrested and brought an action against the bankrupt, in which the bankrupt had given a cognovit for the debt and costs. As to the debts said to be due from the partnership, the affidavits, in reply, stated that the claims in respect of them had been virtually abandoned as far as *Wills* was concerned, no demand having been made upon him since the dissolution, the bankrupt having been treated as the only person liable to them.

Mr. *G. Richards* for the petitioners.

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GRAZEBROOK
and others.

Mr. *Swanston* and Mr. *Girdlestone*, jun. for the respondents, took a preliminary objection to the form of the petition by several creditors. It had three distinct claims for its object, which rendered it multifarious, namely, to expunge proofs admitted, to admit proofs rejected, and to remove the assignees.

Mr. *G. Richards*, contra, cited *Ex parte Howell* (a), *Ex parte Bousfield* (b), where it was held that a petition by several creditors to prove and to remove assignees was not multifarious, they having one common object. If the petition prayed merely for the expunging and admission of proofs, the case might be different.

The COURT thought the objection bad, since the prayer for the removal of the assignees was, at least, a common object, and the rest might, even if bad, be considered surplusage. The objection was therefore overruled.

Mr. *G. Richards*, for the petition, contended that the prior partnership debts being still unsatisfied, the partner of the bankrupt had no right of proof for a sum agreed to be due between him and the bankrupt, against the separate estate of the bankrupt. The commissioner had admitted the proof merely on the presumption that he had no jurisdiction as to the question of partnership. Until all the joint debts are wound up, the partnership continues for every purpose as far as the joint creditors are concerned; *Ex parte Ellis* (c), *Ex parte Carter* (d), *Ex parte Moore* (e).

(a) 1 Mont. 129. (b) Id. 128. (c) 2 G. & J. 312.

(d) Id. 233. (e) Id. 166.

Mr. *Swanston* and Mr. *Girdlestone*, jun. for the respondents, were stopped by the Court.

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GRAZEBROOK
and others.

The COURT was of opinion that there was no ground for disturbing *Wills*' proof. His debt was contracted upon a balance acknowledged to be due to him on a stated account at the time of the dissolution of partnership, and long prior to the bankruptcy. At that time it became a debt on which he could have commenced an action (as he had done) against the present bankrupt; and if, in that state of circumstances, the bankrupt had filed a bill in equity for the purpose of restraining such action, the account stated would have formed a decisive objection to that application. Moreover, he had a lien on any outstanding partnership property to the extent of his debt, in the same manner as was held in *Parker v. Ramsbottom* (a). The debt of *Wills* was purely a separate debt, while those of some of the petitioners were joint, and in respect of which they could take no dividend under the separate commission until all the separate creditors were satisfied. Thus no competition could arise between them and *Wills*, and therefore their claims could form no ground for removing *Wills* from the office of assignee.

In the case of *Ex parte Ellis* (b), the petitioner, by authorizing the use of his name, continued, for the purposes of that petition, to be a partner of the bankrupt. That was not a question of abstract proof, but of proof in competition with joint creditors, with those to whom the petitioner was an accounting party. So it was also in *Ex parte Carter* (c). In those the debt

(a) 3 Barn. & C. 257.

(b) 2 G. & J. 312.

(c) Id. 233.

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—
Ex parte
GRAZENBROOK
and others.

was merely an equitable debt. In the present case the partnership had been long dissolved, and the bankrupt adopted as the only party liable to pay the debts formerly due from the firm. The debt was contracted at the time of the dissolution, and became a separate legal debt suable at law. It was such a debt also as would have been a good foundation for a commission to have issued upon, and therefore good for the purposes of proof. The case of *Ex parte Moore (a)* was also different from the present, that was merely a question whether a solvent partner at the time of the bankruptcy could prove against the joint estate, upon indemnifying the joint creditors. The petitioner, being a separate creditor, does not come in in competition with joint creditors, they cannot therefore be prejudiced by his remaining assignee; and being a separate creditor to a large amount, he is interested to do the best for the estate in the character of assignee. Such being the opinion of the Court as to the removal of the assignees, the petition in other respects was considered multifarious, and therefore was dismissed with costs.

(a) 2 G. & J. 166.



1832.

Ex parte WILLIAM and THOMAS COX.—In the matter
of CHARLES REEKS BURFORD.


December 14.

Substituted
service of peti-
tion on respon-
dents solicitors.

ON the 10th March 1832 the above petitioners presented a petition, praying that *Charles Smith* and *William Russell* might be discharged from being assignees of the estate and effects of the above bankrupt; and on the hearing of the petition, leave was given to the petitioners to prosecute any inquiry relative to the motives of the petition before Mr. Commissioner *Fonblanque*. The Commissioner found that the complaints against the assignees were well founded. The petitioners then presented a petition on the 7th December inst. to confirm the Commissioner's report, and to remove the assignees. Since the filing the original petition *Smith* had absconded and became bankrupt, and kept out of the way, as also did *Russell*, so that the petition could not serve, and the petitioner was unable to proceed in the ~~last~~ filed petition within the eight days for which it was answered.

Mr. *Keane* now moved that the petition might be re-answered, and that service of it on the solicitors of the above assignees, who had acted in their behalf in all measures under the commission, might be deemed good service.

The COURT made the order, also directing a copy of the petition to be left at the last place of abode of *Charles Smith*.



1833.

CASES

IN

HILARY TERM, 1833,

IN THE

THIRD YEAR OF THE REIGN OF WILLIAM IV.

 Ex parte ARNSBY.—In the matter of LORD.

January 12.

Where documents are referred to in an affidavit, it does not give the other side an absolute right to their production, but it is a matter for the discretion of the Court. *Motion* for this purpose, before hearing petition, refused with costs.

THIS was a motion that certain documents or exhibits referred to in the affidavits of the respondents might be produced or filed in this Court^(a), or copies delivered to the petitioner; or else that the affidavits referring to them might be taken off the file for impertinence.

Mr. *Swanston*, with whom was Mr. *Montagu*, in support of the motion. If documents are filed with the affidavits, or be referred to therein, they become part of the affidavits, and, according to the established practice in Chancery, the opposite side have a right to the inspection of them. [*Erskine*, C. J.—The first question is, who is to pay for the copies required? You cannot have copies without paying the expense of them.] That rule only applies to office copies. All we want are common copies, and the question of costs of them must remain for future consideration. They must be regarded as costs in the matter of the petition.

(a) Vide *Wiley v. Pistor*, 7 Ves. 411.

1833.

Ex parte
ARNSBY.

The act of using affidavits should be regarded for this purpose as a *virâ voce* examination; and a party under examination, in relying on any document in his possession, may be compelled to produce it. Originally it was the practice to set out a document, instead of merely referring to it; but in order to save expense the latter course has become usual, though, at the same time, the other side has always the liberty of inspection. [*Erskine*, C. J.—At the hearing of the petition, it may turn out that the respondents will not make any use of the affidavits. Would it not, therefore, be better to wait until the hearing?] If that course is adopted, we, the petitioners, shall be delayed, since the petition must stand over to afford us time to answer the case made upon production of these documents. Besides, if they are not intended to be used as evidence, we are entitled at once to have the affidavits referred for impertinence.

Mr. *Wright* and Mr. *Bethell*, for the respondents, were stopped by the Court.

ERSKINE, C. J.—There is no doubt of our jurisdiction in the cases put by the counsel for the motion; but, at the same time, it is a matter resting more in the discretion of the Court than in any positive right in the applicants. I cannot agree that it is established in practice, that the reference to a document in an affidavit vests a right in the other party to the production and inspection of it. I think it a matter of mere discretion, and if we are to exercise it at the present moment, and before the petition comes on for hearing, the consequence will be, that we must go through

1833.

Ex parte
ARNSBY.

the entire case now, for the purpose of guiding our judgment, and we shall have also to hear it again at the regular time for hearing the petition, whereby a great inconvenience and loss of public time must take place. This we must avoid, by waiting till the hearing, when, if necessary, the petition can be ordered to stand over for any purposes the petitioners can require arising out of the withholding of the documents at the present time. The question of costs, arising out of ~~the~~ delay, will then be considered also. Therefore I think this motion must be refused, and with costs.

Sir J. CROSS and Sir G. ROSE concurred.

Motion refused with costs.

Ex parte JOHN CLARKE.—In the matter of WILLIAM
WITHERS.

December 15.
January 17.

Although the adjudication has been reversed a creditor has no right to the annulling the fiat, even on a petition presented before the 42d day, if, up to the hearing of petition, the bankrupt has never surrendered.

Cross, J. dissent.

A FIAT issued against the above named bankrupt on the 26th June 1832. The petition was presented before the expiration of the 42d day by the above petitioner, as a creditor of the bankrupt, to the amount of 350*l.*, for the purpose of impugning the petitioning creditor's debt, and praying a reversal of the adjudication and annulling of the fiat. The Court, upon a former occasion, finding that the petitioning creditor's debt was defective, *reversed the adjudication*; but no person appearing for the bankrupt, and it turning out that the bankrupt had not then surrendered, but had gone to America, the petition was adjourned, and the order suspended till the 42d day had expired, and thence from time to time till the 17th January. Up till

the present application the bankrupt had never surrendered under the fiat. The Court, on the 15th December last, continued the suspension of the order for annulling the fiat, taking time to consider the propriety of allowing such an order to go under the circumstances.

1833.

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Mr. *Swanston* and Mr. *Rogers* now contended, that the absolute unconditional order for a supersedeas ought to issue. The adjudication being reversed, it becomes a legal right of the creditor to have the fiat annulled. [*Erskine*, C. J.—You must show that it is a legal right. Can you produce any authority to satisfy us that it can be carried further than a mere discretionary power in the Court?] Judicial discretion, we contend, can only be exercised in reference to legal rights. It has been said, that before a commission can be superseded, the bankrupt must have surrendered; that is, that he must submit himself to a sentence which has been declared to have been improperly adjudged, before it can be superseded. But in the case of *Ex parte Nichols* (a), where the petition is presented before the 42d day, it was held, that the commission might be superseded, although the bankrupt had not surrendered himself to the Commissioners. So in *Ex parte Roberts* (b), which was a petition by the bankrupt to supersede a joint commission for want of a petitioning creditor's debt, it was objected that he had not surrendered, and the objection was allowed. The joint creditors then applied to supersede the joint commission, as it had issued on an insufficient debt, and it was superseded. That case was an instance of an appli-

(a) 2 G. & J. 101.

(b) 2 Rose, 378; and see in argument *Ex parte Peaker*, 2 G. & J. 340.

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cation being made with effect by the bankrupt's creditors. In the present case, the fiat has been declared null and void; and in addition to that circumstance, the petition was presented before the 42d day had elapsed. [*Erskine, C. J.*—Confine your attention more to the injury the creditor will sustain by the suspension of the fiat, and to his abstract right to an unconditional supersedeas.] We contend, that the right exists, inasmuch as the creditor, if he sees cause, cannot, during the suspension of the former fiat, issue a new fiat, unless he first obtains an order of this Court for liberty to do so. Neither can he take measures at law for the recovery of his debt; and if the present petitioner, who is a legal mortgagee, proceeds to sell, no one would purchase on account of the doubt as to the title of the assignees, so long as the fiat is suspended over the head of the bankrupt.

Mr. *G. Richards*, for the respondents, the assignees, was stopped by the Court.

ERSKINE, C. J.—With respect to the objections, that a new fiat cannot issue without the order of this Court, and that the title of the assignees may be a bar to a sale, we can at once obviate them, by granting the order for a new fiat, and also by restraining the assignees from setting up any title under the old fiat. On the general question, I conceive that a *creditor* has no legal right to have the fiat superseded, unless he can show that he will otherwise be damnified in some way or other. I was particularly anxious that the petitioner's counsel should point out some injury of this nature; but they have been unable to show one that is not

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immediately got rid of by the order which the Court offers to make, which is sufficient to distinguish the present case from that of *Ex parte Roberts* (a). Under the circumstances of the non-surrender, I think that the Court should not part with the fiat, till it is more satisfied with what has been done under it in the first instance; for there are very suspicious circumstances attending the whole transaction. If any injury had been pointed out to which the petitioner was subjected, the Court would not have refused the order; or if any injury shall hereafter arise, he has but to come to this Court, and we will relieve him. The superseding the fiat is strictly a matter of legal discretion in the Court; and I feel satisfied, for one, that justice will be best attained in this case by suspending the fiat.

Sir J. Cross.—I regret that I feel bound to differ in opinion with my learned colleagues upon the result of the present application. The petitioner, being a creditor, has established to the satisfaction of the Court, that there is no good petitioning creditor's debt, and the Court has accordingly reversed the adjudication. The fiat is thus established to be invalid, and, in my opinion, a legal ground is shown for an immediate supersedeas. But the Court says "No! we will suspend the fiat." So long, however, as the fiat is suspended, *Withers* still continues a bankrupt, and the feelings of himself and his family ought to be considered. The petitioner also is in a state of ignorance of what course he ought to pursue for the recovery of his debt, and what he should do with his mortgage. The bankrupt remains perhaps a felon, and must continue

(a) 2 Rose, 378.

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under that imputation, and the other creditors do not know if they are to treat him as a bankrupt or not. Before the Court comes to its present decision, I think they ought to have been satisfied that some injury will be sustained by the immediate supersedeas; but none has even been suggested as likely to arise to any party. If any rights had arisen under the fiat which would be disturbed by the supersedeas, I can easily conceive why the order should be suspended; but there is not any suggestion of that nature. Where, therefore, we see that the preponderance of injury arises by impounding the fiat, I conceive the Court will not do its duty unless it unreservedly annuls it.

Sir G. ROSE.—I am of opinion that the Court is bound to see that the bankrupt has surrendered, before it parts with its control over him, which it possesses by means of the fiat. The supersedeas of a fiat is not a matter of right, even at the instance of the party against whom it has issued, and still less so at the instance of a *creditor*. If the bankrupt indeed has tried the validity of the commission at law, and that with success, then he may demand the supersedeas; but there is no instance in which it has been done, on the petition of the creditors, as a matter of right. Show us, that by impounding the fiat the petitioner is injured, and we will direct the supersedeas to issue. On what ground has a *creditor* a right to urge the feelings of the bankrupt, and of his friends, on his remaining a felon, as an argument against our present order? It is rather calculated to raise the suspicions of the Court that he has some underhand motive of his own.

The order was, that the fiat and proceedings should be impounded in the hands of the Court, not to be removed without leave of the Court, and notice thereof to the petitioner. That the assignees be restrained from setting up any title under the impounded fiat; and that any person should, in the mean time, have liberty to take out another fiat.

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Note.—See the case of *Ex parte Foulger, re Palmer*, 18th Feb. 1833, Mr. G. Turner for the petitioner.

Ex parte WILLIAM LAFOREST.—In the matter of HENRY LIVING, JOHN SHEEN DOWNES, and JOHN LIVING; and in the matter of WILLIAM REYNOLDS and MICHAEL MEMORY WRIGHT; and in the matter of JOSEPH REYNOLDS, bankrupts. And
Ex parte THOMAS WETHERELL.—In the matter of the same bankruptcies.

THE petition in *Ex parte Wetherell* stated, that on the 24th November 1823, a petition was preferred by *R. Jones* and *Thomas Morris*, (in whose stead, they being both dead, the petitioner *William Laforest* was appointed,) assignees of *Reynolds* and *Wright*, stating that the commission against *Living & Co.* issued 23d July 1812, at the instance of *Thomas Wetherell*, the petitioner, and under which he and two other persons were chosen assignees. On the 22d May 1813, a commission, at the suit of *J. Tasker*, issued against *Reynolds* and *Wright*, and *Jones* and *Morris* were chosen assignees. The bankrupts *Living & Co.* had previously been in the habit of drawing and accepting accommodation bills upon and in favour of *Reynolds*

January 14, 18,
19.

Where part of the account between two mercantile houses, which became bankrupts, consists of bills that may be proved against both estates, there can be no proof in respect of those bills as between the two houses, unless there is a surplus after satisfying the holders of the bills.

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and *Wright*, who were, at the same time, in the habit of drawing and accepting accommodation bills upon and in favour of *Living & Co.*, by which means there was a large issue of accommodation bills between the two houses. At the date of the commission against *Living & Co.* *Reynolds* and *Wright* were, according to the master's report, in advance of *cash* to *Living & Co.* in the sum of 14,412*l.* 13*s.* 4*d.* for actual cash advanced, and interest, independent of any accommodation bills then floating and undue. At that time there was no cross demand against *Reynolds* and *Wright*, but they were under accommodation acceptances for *Living & Co.* to the amount of 6494*l.* 15*s.* 6*d.*, and *Living & Co.* were under similar acceptances for *Reynolds* and *Wright*, then undue, to the amount of 13,535*l.* 1*s.* At a meeting for a final dividend under *Living & Co.*'s estate, *Jones* and *Morris*, the assignees of *Reynolds* and *Wright*, proved a debt of 14,947*l.* 6*s.* 8*d.* as the cash balance (reduced by the master's report) against *Living & Co.*'s estate. Such proof was opposed by the assignees of *Living & Co.*, on the ground of the bills being undue at the time of the commission; and a dividend of 1*s.* 2*d.* being declared, *Jones* and *Morris* prayed the payment of such dividend on their proof. On the 24th November 1823, a petition was preferred by *Jones*, the surviving assignee of *Reynolds* and *Wright*, stating the commission against *Living & Co.*; and that on the 12th February 1813, a commission issued against *Joseph Reynolds*, and that he and *James Edwards*, since deceased, were chosen assignees. A similar custom had existed between *Joseph Reynolds* and *Living & Co.* as to cross accommodation

acceptances. At the date of *Living & Co.*'s bankruptcy, *Joseph Reynolds* was, according to the master's report, in advance of *cash* to *Living & Co.* to the amount of 18,443*l.* 13*s.* 6*d.*, independent of undue bills; and *J. Reynolds* was under accommodation acceptances in favour of *Living & Co.* 11,614*l.* 16*s.*, and *Living & Co.* were under such acceptances in favour of *J. Reynolds* 10,625*l.* 4*s.* At the final dividend meeting under *Living & Co.*'s bankruptcy, the assignees of *J. Reynolds* proved the 19,798*l.* 9*s.* 3*d.* as the cash balance, (but which was also reduced by the master's report;) and such proof was opposed on the ground of the outstanding bills, but after argument the proof was admitted. The dividend of 1*s.* 2*d.* being declared under *Living & Co.*'s estate, the last-mentioned petition prayed the payment thereof.

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The following is the state of the accounts between the parties, as found by the master in his report.

Living & Co. in account with Reynolds and Wright.

Dr.	£.	s.	d.	Cr.	£.	s.	d.
By cash balance ..	14,412	13	4	By bills undue at			
By bills undue at the				the time of the			
time of the bank-				bankruptcy, given			
ruptcy, given by				by <i>Living & Co.</i>			
<i>Reynolds</i> and <i>W.</i>				to <i>Reynolds</i> and			
to <i>Living & Co.</i>	6,494	15	6	<i>Wright</i>	13,535	16	0

Living & Co. in account with Joseph Reynolds.

Dr.	£.	s.	d.	Cr.	£.	s.	d.
By cash balance ..	18,443	13	6	By bills undue at			
By bills undue at				bankruptcy, given			
the time of the				by <i>Living & Co.</i>			
bankruptcy, given				to <i>J. Reynolds</i> ..	10,625	4	0
by <i>J. Reynolds</i> to							
<i>Living & Co.</i>	11,614	16	6				

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On the 30th April 1824, the petitioners *Wetherell* and *Stonehouse*, then surviving assignees of *Living & Co.* preferred their petition, stating in part as hereinbefore stated, and further, amongst other things, that when the assignees of *Reynolds* and *Wright* proved the debt of 14,947*l.* 6*s.* 7*d.*, they, *Wetherell* and *Stonehouse*, were unable to substantiate their case against such proof, owing to their accountant having omitted to furnish a counter-statement; and such proof was admitted without prejudice to the petitioners' right to resist payment of the dividend to the extent of objectionable parts. And the petition stated, that the claim of the assignees of *Reynolds* and *Wright* was founded on erroneous suppositions; first, that at the time of the bankruptcy of *Living & Co.* *Reynolds* and *Wright* were in advance of cash to *Living & Co.* to the amount of 14,947*l.* 6*s.* 7*d.* principal and interest, due from *Living & Co.* to *Reynolds* and *Wright*; secondly, that there was no cross-demand against *Reynolds* and *Wright* on the part of *Living and Co.*; thirdly, that *Reynolds* and *Wright* were under accommodation acceptances for *Living & Co.*, then outstanding, to the amount of 6494*l.* 15*s.* 6*d.*; whereas it appeared, upon a minute examination of the accounts between them, *Living & Co.* were only indebted to the amount of 103*l.* 4*s.*; and on these grounds the petition prayed, that the proof for 14,947*l.* 6*s.* 7*d.* might be expunged, and for an account to be taken. A similar petition was presented, as to the proof, by the assignees of *Joseph Reynolds*, for 19,798*l.* 9*s.* 3*d.*; the true state of that account being, as the petition alleged, that *Joseph Reynolds* was indebted to *Living & Co.* to the extent of

901*l.* 2*s.* 8*d.* Upon these four petitions it was, on the 28th March 1825, referred to the master to take an account of what was due from *Living & Co.* to *Reynolds* and *Wright*, and from *Living & Co.* to *Joseph Reynolds*, excluding all bills not then due; and to take an account of all bills not then due between *Living & Co.* and *Joseph Reynolds*, together with the consideration of such bills, with liberty to state special circumstances; and the dividends, on the proofs made by the assignees of *Reynolds* and *Wright*, and of *Joseph Reynolds*, to be paid into the bank.

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The master prepared the draft of his intended report, (the substance of which, as far as regards the present question, may be collected from the objections following,) to which the petitioner, *Wetherell*, objected; first, because in stating the accounts between *Living & Co.*, and *J. Reynolds*, upon the footing of excluding the bills on both sides, then outstanding and unpaid, the master had found the balance of 18,443*l.* 13*s.* 6*d.* in favour of *J. Reynolds*; whereas no such balance was due, inasmuch as *Living & Co.* had given bills to the amount of 10,625*l.* 4*s.* to *J. Reynolds*, which were then in circulation, he having negotiated and received the value thereof, against the balance of 18,443*l.* 13*s.* 6*d.*, which bills ought to have been deducted therefrom in order to have ascertained correctly the balance then actually due from *Living & Co.* to *J. Reynolds*; namely, the balance of 7,818*l.* 9*s.* 6*d.*; and because the master, in taking the accounts between *Living & Co.* and *Reynolds* and *Wright*, upon the footing of excluding the outstanding bills on both sides, had in like manner found the value of 14,412*l.* 13*s.* 4*d.* due in favour of *Reynolds* and *Wright*; whereas *Living &*

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Co. had accepted bills for *Reynolds* and *Wright* to the amount of 13,535*l.* 1*s.* which were then in circulation, and had been negotiated by *Reynolds* and *Wright*, who received the value of them; which bills being deducted would leave the balance of 877*l.* 12*s.* 4*d.* only. And second, because upon the inquiry into the consideration for the several outstanding bills, the master had found such consideration to have been the balances of 18,443*l.* 13*s.* 6*d.* and 14,412*l.* 13*s.* 4*d.*, as due to *J. Reynolds*, and *Reynolds* and *Wright* respectively; whereas no such balances were in fact due when the bills were given, and inasmuch as at the time of their bankruptcies, *J. Reynolds* and *Reynolds* and *Wright* had possessed themselves of cash arising from the discount of the outstanding bills received by them from *Living & Co.*, which bills had been negotiated and were then in circulation, and for which they ought to have given *Living & Co.* credit against such cash balances. Several other objections were made, but being immaterial to the question of law, they are not here given, and the whole of the objections to the report were overruled, on the ground that the finding was correct according to the order of the Court. Under these circumstances, the petition of *Wetherell* prayed, that the report might be referred back to the master.

And, under similar circumstances, the petition of *W. Laforest* prayed, that the master's report might be confirmed, and the proof allowed to stand, deducting the difference between the amounts proved and that found due by the master. Upon the question of law arising out of the two objections above set out, the two petitions came before the Court.

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Mr. *Montagu* and Mr. *Keene*, for the petitioner *Wetherell*, contended in favour of the objections. The bills having been negotiated and being in the hands of third parties, the estate of *Living & Co.* is liable to pay those bills, and their assignees are entitled to consider them as so much cash advanced, to be deducted from the cash balances found by the master, to be due by *Living & Co.* to *Reynolds* and *Wright*, and to *J. Reynolds* respectively. A creditor of a bankrupt to the amount of 1000*l.*, receiving a bill for that sum, which is in his hands at the time of the bankruptcy, is entitled to prove for the 1000*l.*; but if he has parted with that bill before the bankruptcy, then his right has ceased, for there cannot exist a double right of proof against the estate; for instance, the creditor cannot prove for the whole, and the bill-holder prove for the whole likewise; neither can the creditor prove for a part, and thereby deprive the bill-holder of proof to the extent of that part. The bill-holder alone can be entitled to prove. This would clearly be the case if the creditor were solvent, and there is no perceptible reason why the assignees of that creditor should be in a different situation. In *Ex parte Read*(a), the petitioner being a creditor of the bankrupt on a cash balance, and being under acceptances for the bankrupt's accommodation, which were not paid at the bankruptcy, and having received from the bankrupt bills, which were negotiated, to a larger amount than the cash balance, was not allowed to prove the cash balance, on the principle of excluding the dishonoured paper on both sides. And as to the cases of *Ex parte Walker* (b) and *Ex parte Earle* (c),

(a) 1 G. & J. 224.

(b) 4 Ves. 373.

(c) 5 Ves. 835.

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Lord *Eldon*, in the case of *Ex parte Rawson* (a), has declared that he cannot think the former one right. In the present case the amount to be proved is the difference only upon taking into the account the cash balance and the bills on both sides.

Mr. *Swanston* and Mr. *Rogers*, for the counterpetition of *W. Laforest*, were stopped.

ERSKINE, C. J.—I am decidedly of opinion that *Ex parte Rawson* settles this very question: and when that case was mentioned by the counsel for the petitioner *Wetherell*, I thought they were about to show that it had been overruled; I was therefore much surprised to find they relied upon it in support of their view of the question. Although in that case Lord *Eldon* says he could not understand the case of *Ex parte Walker* (b), yet, speaking of that case, he proceeds:—"The decision was this, that where there are cross-bills drawn for accommodation, they are all to be thrown out of the account on both sides, and it is to be taken as if it were a cash account only. If this were upon the principle that applies to one or two bills, that they are not to be proved by one estate against the other, till all the creditors of both are paid, I could understand it. If there be 1000*l.* of acceptances on the one side, and 10,000*l.* on the other, Lord *Loughborough* says, that they are not to be regarded at all, that it is all chance how the two estates may pay. I say, not; and if there be a surplus of one estate to satisfy the other, why should it not be applied? Upon reading the papers it appears to me, that if Lord *Lough-*

(a) 1 Jac. 274.

(b) 4 Ves. 373.

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Borough's decision be right, it does not make a great deal of difference in the effect, whether there be a bill account and a cash account, or whether there is only one. Still, if so much of it as consists of bills, consists of bills that may be proved against both estates, how is it possible, till the creditors proving them are satisfied, that one estate can make any proof against the other with reference to those bills? How can they be allowed to come in competition with their own creditors? The utmost, therefore, would be to reserve the consideration of it, in the event of there being a surplus." This very case, therefore, decides this point, namely, that where there are cross-bills to which both estates are liable, the whole of them must be struck out of the account, and the cash balance alone proved, until the event of a surplus. *Ex parte Rawson* is not conflicting with *Ex parte Walker* and *Ex parte Read*, but in my opinion is confirmatory of the principles therein contained. The case of *Ex parte Metcalf* differs from this case, inasmuch as there was only a cash balance on one side against bills on the other, and therefore is hardly in point on the present occasion. I therefore think the master's report must be confirmed and the proof allowed to stand, deducting the sums taken off by the master.

Sir J. Cross.—If this were the first occasion on which the point in dispute had been raised, and if there were no authorities upon the subject, the Court would have been as much perplexed in delivering its judgment as was Lord *Thurlow* some thirty years ago, and would require some further time for deliberation. But I look upon this as a settled question ever since the decision

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in *Ex parte Walker*. Now it has been said that the authority of that case has been questioned by Lord *Eldon*, and doubted by other lawyers of eminence; but I think it has always been approved of, and at least followed. Lord *Eldon*'s observations only extend to imply that the case is reported too broadly, namely, in the case of a surplus the bills are not to be absolutely excluded. I think we cannot do better than sum up our judgment as a general proposition, by adopting the words of the marginal note in *Ex parte Rawson*, namely, that "where part of the account between two mercantile houses, which became bankrupts, consists of bills, that may be proved against both estates, there can be no proof in respect of those bills as between the two houses, unless there is a surplus, after satisfying the holders of the bills." And I am of opinion that these bills are not to be brought into the account, and therefore there is no ground for the claim set up by Mr. *Montagu*'s client, except as to the reduced amount of proof. I shall only add, that I think there is this difference between the present case and that of *Ex parte Reid* (a): in the latter, one of the parties was solvent, while in the present one both have been declared bankrupts, which makes a considerable alteration in the equities of the case.

Sir G. ROSE.—I fully concur in the judgments already pronounced. In *Ex parte Walker*, one great difficulty, with which we have not to deal on the present petitions, was, that one of the bankrupts had still the cross-bills in his hands, while the other had negotiated those he had received in exchange. I cannot agree that *Ex*—

(a) 1 G. & J. 224.

parte Walker has ever been considered unintelligible; *Ex parte Rawson* only pronounces it to be so in the event of a surplus, which alone could vary the rights of the parties in respect of the bills. As long as both estates are insolvent, I think the mutual equities are best worked out by suffering proof against both estates on the cash balance only; which is Lord *Eldon's* manifest opinion in *Ex parte Rawson*.

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The Order made was, that the exceptions to the master's report should be overruled with costs. The proofs to stand, except as to the reduction of the amount to what the master found the cash balances to be, and the bills to be excluded from proof altogether, as far as dividends were to be taken, until there should be a surplus; and the costs of each party to be borne by their respective estates.

In the matter of HAMB DEN (a).

MR. SHAPTER applied on the petition of the petitioning creditor to postpone the advertisement in the Gazette, the bankrupt having entered into a treaty with his creditors for a composition; sixteen out of eighteen creditors had agreed to take the composition, and the bankrupt swore that he was solvent and his estate was more than sufficient to pay all demands against him. But the validity of the commission was not disputed. No case in point was cited.

January 28.

Advertisement in Gazette not postponed to give effect to compromise, where commission is not disputed.

(a) See *Ex parte Ogilby*, 1 G. & J. 250.

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 In re
 HAMBDEN.

Mr. *Montagu*, amicus curiæ, referred to *Ex parte Raffenstein* (a), where an application of this nature was refused.

The COURT however thought that they had no power to grant the application. The only cases (b) in which the Court had interfered to stay the certificate were those in which the validity of the commission was disputed. Although sixteen out of the eighteen creditors consented to the composition, yet as no advertisement had been inserted there might be many creditors who had never heard of the bankruptcy, and their coming forward might materially vary the state of the circumstances. The application was therefore

Refused.

(a) 1 Mont. & B. 84.

(b) *Ex parte Lancaster*, 17 Ves. 513 ; *Ex parte Foster*, id. 414 ; S. C. 1 Rose, 49 ; *Ex parte Preston*, 1 Rose, 259 ; *Ex parte Fletcher*, id. 336 ; S. C. 1 V. & B. 350 ; *Ex parte Tarleton*, 19 Ves. 464 ; *Ex parte Ainsworth*, 2 G. & J. 89.

In the matter of MOODY.

January 28.
 Time for opening fiat not enlarged to give effect to arrangement for composition.

MR. *MESSITER* applied that the time for opening the fiat, which would expire on the morrow, might be enlarged for one month, in order to give time to complete an arrangement for a composition which was then in negotiation.

The COURT, upon the principle that it would lead to much extortion if these applications were granted, and in accordance with the case of *Ex parte Downton*, in re

Wisdén (a) refused the motion, and observed, that if all the creditors were willing to accept a composition the fiat would fall to the ground of itself.

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Moody.

Motion refused.

(a) 1 Dea. & Ch. 111.

Ex parte WYATT.

THIS was a motion by a creditor and next of kin of an intestate, for leave to prove against the estate of the bankrupt administrator, and for liberty to vote in the choice of assignees, and to sign the certificate.

January 29.

Where order of Court is necessary to enable a party to prove, he cannot vote or sign certificate; for instance, trustees, executors, &c.

Mr. *Swanston*, in support, contended, that although he was aware that a general rule had crept in, to the effect that when the order of the Court was necessary to enable a party to prove, he was always restrained from the right of voting or signing the certificate; yet that doctrine had crept in upon a mere dictum of Lord *Eldon* in *Ex parte Shaw* (a), and before that case the law was otherwise, as appears from the cases of *Ex parte Maltby* (b), *Ex parte Moody* (c). It is true, that prior to the 6 Geo. 4. c. 16. s. 62. joint creditors could not prove for the purposes of voting and signing under the separate commission; but I contend that that alteration in the law by the legislature, tends to show how dissatisfied it was with the principle on which the doctrine was founded, or else why did it interpose? In the case of joint creditors, the right of taking dividends is expressly

(a) 1 G. & J. 127, 163.

(b) 1 Rose, 387.

(c) 2 Rose, 413.

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provided against. Now in the present case the right of dividends is always given, and it seems an anomaly to hold that, giving that right, the creditor shall be excluded from these concurrent and incidental rights of voting in the choice of assignees and of signing the certificate.

The COURT however thought the rule ought to be adhered to, considering the reasons for the dictum, if they were merely such, given by Lord *Eldon* in *Ex parte Shaw*, quite conclusive. An actual creditor has every right incidental to proof, but a trustee ought not to be allowed to interfere either in the choice of assignees or in the signing the certificate, so as to bind his cestui que trust.

It was therefore ordered, that the petitioner be at liberty to tender such proof before the Commissioner as he could support, and receive the dividends, to be paid into the bank. The costs to come out of the estate of the intestate, and the rest of the prayer of the petition to be dismissed.



Ex parte ARNSBY.—In the matter of LORD.

January 31.

The bankrupt's examination cannot be read as evidence against a third party who had no power of cross-examining him. Notice of reading also necessary.

THIS was an application to annul the fiat. In the course of the argument, Mr. *Wright*, for the petitioning creditor, proceeded to read the examination of the bankrupt taken before the Commissioners, in order to disprove the statements contained in affidavits sworn by the bankrupt in the matter.

Mr. *Swanston*, for the petitioner, objected that such examination could not be read against his client, he not being a party present at the examination, and therefore having no power of cross-examination. Besides, no notice had been given of the intention to read it.

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The COURT on both grounds allowed the objection to be good, but observed that the bankrupt himself could not take the objection.

Mr. *Wright* stated, that from contrasting the examination with the affidavit, perjury would clearly be established.

The COURT thought that as regarded the bankrupt, although his examination was always evidence against him, yet upon the present issue the examination could not be read to prove a perjury or felony, they being mere collateral issues irrelevant to the point before the Court. If, in cross-examining a witness, an irrelevant question was put to him, you could not produce evidence to contradict his answer; as for instance, if the question was, Have you ever been in jail? and the answer was, No, although the jailor stood at his elbow; yet he could not be called to prove that he had been in his custody, the question and answer being irrelevant to the matters before the Court.

If on cross-examining a witness, an irrelevant question be put, you cannot produce evidence to disprove his answer, but must take it for better and worse (a).

(a) See *S. P. Harris v. Tippet*, 2 Camp. 637.

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Southampton
Buildings,
February 8.

Semble. A bankrupt is bound to disclose his property although an indictment is pending against him for concealing it, &c. and although his answer may tend to criminate him.

Cross J. dubitan.

Semble. This Court has no power to commit on an adjourned examination from before one Commissioner.

In the matter of JOHN HEATH.

ON the 8th January last, the bankrupt was attending Mr. Commissioner *Fonblanque* under his *last* (a) examination, and demurred to a question that was put to him, on the ground that his answer might tend to criminate him; upon which the Commissioner adjourned the examination to this Court.

The examination, as far as it proceeded before the Commissioner, being reduced into writing, was read over to the bankrupt. Among other things it appeared that the bankrupt in his balance sheet had stated that he suffered a loss of 150*l.* on the sale of certain silks which had cost him 500*l.*

Sir G. ROSE, with a view to the correct state of the proceedings in the event of the Court deciding that they had power to commit in such a case, addressing the bankrupt, said,—“ Upon the occasion of your last examination before Mr. Commissioner *Fonblanque*, the following questions were put to you, which I shall read, and to which you appear to have given the following answers, which I shall also read to you :”—

Q. By an item in your balance sheet it appears, that by silks sold in January 1832, and which cost you 500*l.* you suffered on such sale a loss of 150*l.* Is that so?

A. Yes.

Q. To whom were those silks sold?

A. I am under an indictment at the suit of my assignees for conspiracy in fraudulently and secretly con—

(a) Per Rose, J. It being the final examination makes all the difference with reference to commitment.

cealing and disposing of my goods, and I apprehend the answer to that question may be used against me on the trial of that indictment, and I submit, I am not bound to answer the question, and therefore decline to do so.

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The questions were now repeated to the bankrupt, to which he gave the same replies; and on being asked whether he wished to make any alteration or addition, he replied he did not. In this state of circumstances,

Mr. *Ching*, for the assignees, moved for the bankrupt's commitment.

Mr. *Montagu* contra, on behalf of the bankrupt, showed cause against the commitment. This case comes on under circumstances similar to those in *Ex parte Kirby* (a). It is a well known and established law of the land, that no man shall be bound by his answer to criminate himself. Such is the common law. And again, it is laid down (b) that when a statute passes, it leaves the common law untouched, except as it is altered by the statute, either expressly, or by necessary implication. Now, the section of the statute, under which this examination is taking place, contains neither express words, nor necessary implication, to warrant the dispensing with the common law right in such a case as the present (c). When a right is conferred by

(a) Mont. & M. 212.

(b) 1 Bla. Com. Chit. edit. 83; 2 Mont. & G. n. B X, p. xxiii. division II.

(c) The words of the 36th section are, " That it shall be lawful for the commissioners, by writing under their hands, to summon any bankrupt before them, whether such bankrupt shall have obtained his certificate or not; and in case he shall not come at the time by them appointed (having no lawful impediment made known to them at such time, and allowed by

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statute, or a crime enacted, the right to examine contrary to the common law is not conferred, unless such right is expressly enacted (a).

In *Smith v. Read* (b) the Lord Chancellor says, "I think the defendant is not bound to discover, for there is no rule more established in equity, than that a person shall not be obliged to discover what will subject him to a penalty, or to any thing in the nature of a penalty; and where the legislature intended discoveries of what is penal, they have put in clauses for that purpose; as in the stat. of the 12 Ann. c. 14. of the livings belonging to papists." So is it in the 7 Geo. 2. c. 8. against stock-jobbing; a discovery being there directed to be

them), it shall be lawful for the said commissioners, by warrant under their hands and seals, to authorize and direct any person or persons they shall think fit to apprehend and arrest such bankrupt, and bring him before them; and upon the appearance of such bankrupt, or if such bankrupt be present at any meeting of the said commissioners, it shall be lawful for them to examine such bankrupt on oath, either by word of mouth, or interrogatories in writing, touching all matters relating to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, and to reduce his answers into writing; which examination, so reduced into writing, the said bankrupt shall sign and subscribe; and if such bankrupt shall refuse to be sworn, or shall refuse to answer any questions put to him by the said commissioners touching any of the matters aforesaid, or shall not fully answer, to the satisfaction of the said commissioners, any such questions, or shall refuse to sign and subscribe his examination so reduced into writing as aforesaid (not having any lawful objection allowed by the said commissioners), it shall be lawful for the said commissioners, by warrant under their hand and seals, to commit him to such prison as they shall think fit, there to remain without bail until he shall submit himself to the said commissioners to be sworn, and full answers make to their satisfaction to such questions as shall be put to him, and sign and subscribe such examination."

(a) 2 Mont. & G. Appendix, p. xxiii. proposition III.

(b) 1 Atk. 527.

made, although it tends to forfeiture and penalties
Bancroft v. Wentworth (a).

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In *Brace's* case (b), *Smith v. Beadnell* (c), and *Ex parte Burlton* (d), it is most satisfactorily established that the plea of tendency to criminate is a complete bar to the question put to *a witness*, even in bankruptcy, where the charge was an embezzlement of the bankrupt's property. So the protection is afforded to parties (e). Now, I am unable to discover what difference can be drawn between the situations of witnesses and parties to suits, and that of a bankrupt. To warrant such a difference we must either find express statutory enactment or positive decision, neither of which does exist. By the statute, the Commissioners are only enabled to propose *lawful* questions. Now I submit, that a question having a tendency to criminate cannot be a *lawful* question. Certain it is, that every question propounded is not a lawful question, to which an answer can be enforced. Suppose, for instance, the Commissioner put this question: Did you not rob a man of 100*l.* on Hounslow Heath? Is it for a moment to be said, that the bankrupt is bound to answer it. And that question in its consequences is like the one now proposed, "did you fraudulently dispose of the silks?"

Now, although in the case of *Ex parte Meymott* (f), Lord *Hardwicke* held, that where the commission was founded on a smuggling trading, and every question put to him would have a tendency to convict him of the

(a) 3 Bro. C. C. 11. And see *Bullock v. Harrison*, 11 Ves. 374, 52 G. 3. c. 62. s. 35; *Windale v. Full*, 3 Bro. C. C. 11, note.

(b) Comb. 391.

(c) 1 Camp. 31.

(d) 1 G. & J. 32.

(e) Beame's Pleas, 259, and cases there collected.

(f) 1 Atk. 196.

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offence of smuggling, yet the *commission* should proceed. But he had never there said, that the *examination* should proceed; and with respect to the case of *Ex parte Burr* (a), referred to by Mr. Cooke as an authority in support of enforcing an answer from the bankrupt, and which was a question on gaming, it is observable, that in the Office Book (b) no mention is made of reference to the commissioners to examine as to gaming.

The case of *Ex parte Nowlan* (c) does not warrant the furtherance of this examination, but rather tends to strengthen the view I take on this question; for there, as the Lord Chancellor remarks, the bankrupt did “not object to answer on the ground, that the questions tend to call for answers which might implicate him in crime, and *which therefore he is not bound to answer.*”

In *Ex parte Oliver* (d) all that relates to this question is a mere dictum of the Lord Chancellor, and is not any decision on the point. The same observations apply to the case of *Ex parte Cossens* (e), for there the petition was dismissed.

The case of *Ex parte Pratt* (f) merely goes to this extent, viz. that a bankrupt must disclose his property, notwithstanding the disclosure may reveal the commission by him of an act of bankruptcy, it having been determined in equity (g) that a bankrupt could not be compelled to disclose the time of his having committed it.

The case of *Ex parte Innes* (h) may be mentioned to

(a) 1793, Cooke, 497.

(b) February 9, 1793, Office Book 86, p. 20.

(c) 11 Ves. 514.

(d) 1 Rose, 407; 2 V. & B. 244.

(e) Buck, 506.

(f) 1 G. & J. 58.

(g) *Chambers v. Thompson*, 4 Bro. C. C. 434.

(h) Buck, 337.

show how unwilling the Courts are of depriving bankrupts of their common law rights and protections. In that case the assignees sought the delivery up of papers deposited by the bankrupt with his attorney in actions commenced before the bankruptcy, for the purpose of instituting criminal proceedings against the bankrupt. The Vice-Chancellor, not doubting his jurisdiction, said, " he was clearly of opinion that the Court would not lend itself to assist the assignees in prosecuting vindictive proceedings of a criminal nature, being foreign to the due administration of the estate."

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In the case of *Ex parte Bromley* (a), it is also held, that pending an indictment, if the parties indicted object to proceed in the hearing of a petition, it is a ground for postponing it; establishing thereby that it is improper in the Court to afford the prosecutor any advantage of additional evidence, which might be used on the trial of the indictment.

Mr. Ching in reply. There is no doubt, and I fully concede the principle, that a man cannot be called on to criminate himself. But I contend, that the case of a bankrupt refusing to discover his property, forms an exception to the general rule. It is equally certain that there is a great difference between the case of a witness, and that of a party or a bankrupt; the former cannot be interrogated by a leading question. But a party may by bill in equity be asked the most straight-forward question. So also may a bankrupt. He is *bound* to discover his estate, and the Commissioners are justified in getting at the discovery by any means in their power.

(a) Mont. & M. 92.

1833.

In re
HEATH.

Sir JOHN CROSS.—The bankrupt says, he has sold these silks. Have they not therefore ceased to be the estate of the bankrupt?

Mr. *Ching*. We charge, that the sale of them has been secret and fraudulent, and therefore wish to examine the bankrupt as to them. By the 6 *Geo.* 4. c. 16. s. 36. it is declared, that “it shall be lawful for them (the Commissioners) to examine such bankrupt on oath, either by word of mouth, or on interrogatories in writing, touching all matters relating either to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts.” It is true we could not call on the purchaser to discover the circumstances of the sale. His plea of purchase for valuable consideration would protect him. But I contend, the case of the bankrupt is rendered very different by the express words of the above section.

Look at the general result arising from holding a bankrupt privileged from discovery, by reason of the pendency of an indictment. If that privilege were afforded him, every bankrupt wishing to avoid passing his examination would have nothing to do but to get some person to prefer a friendly indictment against him (which might never be tried), and then make it a ground of objecting to answer. From the date of such a decision, all examinations of bankrupts would be rendered nugatory. And moreover the actual pendency of an indictment could make no difference; for if such a plea be good, it is as good *quia timet* an indictment, as in the case where it is actually preferred.

As to the authorities cited on the other side, and the

dicta they contain, regard being had to the difference where the discovery may tend to place property at the assignees' disposal, and the discovery is relative to such property, they are all expressly in favour of the assignees on the present occasion.

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ERSKINE, C. J.—A doubt exists in my mind, as to the power of the Court, in circumstances such as the present, to commit the party; and I should prefer hearing a discussion from the bar on that question before expressing any opinion as to the right of pursuing this examination; because, in the event of our finding we have no power to commit, there will be little use in delivering a judgment which we have not power to enforce. However, in the meantime, with regard to the question of the examination, it may not be improper to make some observations upon the arguments and the cases that have been cited. There can be no doubt as to the principle, that a man shall not be bound to convict himself, being a general well established rule; and all the cases cited go to that length. But to every rule there may be some exceptions, and I think the present clearly comes within what Lord *Eldon* says in *Ex parte Cossens* (a), and which is recognized by Lord *Lyndhurst* in *Ex parte Kirby* (b), viz. “ I conceive that there is no doubt, that it is one of the most sacred principles in the law of this country, that no man can be called on to criminate himself if he choose to object to it; but I have always understood that proposition to admit of a qualification, with respect to the jurisdiction in bankruptcy; because a bankrupt cannot refuse to discover his estate and effects, and the particulars

(a) Buck, 540.

(b) Mont. & M. 225.

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In re
HEATH.

relating to them, though in the course of giving information to his creditors or assignees of what his property consists, that information may tend to show he has property which he got not according to law,—as in the case of smuggling, and the case of a clergyman carrying on a farm, which he could not do according to the act of parliament, except under the limitation of the late act; and, the case of persons having the possession of gunpowder in unlicensed places, whereby they become liable to great penalties, whether the crown takes advantage of the forfeiture or not; in all these cases the parties are bound to tell their assignees, by the examination of the Commissioners, what their property is, and where it is, in order that it may be laid hold of for the purposes of the creditors.” Now, with respect to the proposition put by Mr. *Montagu*, I agree with him that you could not ask a man whether he had not robbed another of a sum of money; because if he had so robbed, the money would not be the property of the assignees, but of the party robbed; it would be, in fact, no discovery of the *estate of the bankrupt*. But I can see no objection to this question, (unless it might be regarded as a chain in evidence to convict the party of robbery) viz. “Had you not on such a day, and at such a place, 100*l*.?” And according to the answer you might then interrogate what he had done with it. In the present case the question is, “What have you done with this property,” not “How did you obtain it?” And I think all the cases have been decided in that way of looking at the question.

In *Ex parte Jones (a)*, the Vice-Chancellor refused the application on the ground that the use to be made

(a) Buck, 337.

of the papers was foreign to the purposes of the due administration of the estate; observing that "if the papers were necessary for that purpose, and it should appear to be the intention of the assignees to make a further use of them in prosecuting criminal proceedings, the Court would not order the production without at the same time restraining the assignees from using them for any purposes foreign to the due administration of the estate." That case is not even incidentally applicable to the present question.

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HEATH.

Upon the question of the jurisdiction of this Court to commit, in the present instance of an adjourned examination, I repeat that at present I am not prepared to give any opinion. As a Court of record we have, certainly, the general power to commit for contempt of Court, in not answering; but that brings it back to the original general question of the obligation of a man to convict himself; which is a specific answer to the *general jurisdiction* of every Court, and the right to consider that objection as no bar to examination, only arises under the particular enactments of the bankrupt laws.

Sir J. Cross.—There is no doubt but if the present were a question put to a mere witness at *Nisi Prius*, the objection here taken by the bankrupt would form a successful opposition to it. There is much novelty in the present case; and finding no reported case in which this point has been expressly decided, I own I feel great difficulty in making up my mind at the present moment. My present feeling, however, is against the breaking through of so old established a doctrine as the one now insisted on by the bankrupt; and I think it is

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HEATH.**

worthy to be considered, that the assignees have chosen one remedy by indictment, and ought not, in my opinion, to be allowed the benefit of any examination in furtherance of it. But, with respect to the general question, the actual pendency of the indictment can make no difference, as the fear of indictment is equally a reason in the mouth of the party proposed to be examined; the only difference being, that in the former case the danger of allowing the examination to continue is more glaringly before our eyes.

Sir G. ROSE.—As to the obligation on the bankrupt to answer this question, I, for one, have not a moment's doubt. The expressions used throughout the cases in the books clearly establish, that in a case like the present the bankrupt must answer. There can be no doubt but that this is a lawful question for the Commissioner to put, it being *concerning his estate*, according to the words of the act; that is to say, he must either answer, or be committed for not answering, according to the act. *Ex parte Burlton* (a) was a question of the right of a *witness* to object; for I well remember in that case (in which I was engaged as counsel) examining the bankrupt myself, without any difficulty, although the objection was raised. It is true, there are no reported cases expressly deciding the present question; but it is to be observed, that all such questions have probably arisen before the Commissioners, and therefore would not be reported. In the case of *Ex parte Kirby* (b) the bankrupt was discharged, because the commitment was upon a multifarious question, and the Commissioners might have

(a) 1 G. & J. 32.

(b) Mont. & M. 212.

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In re
HEATH.

conducted the necessary investigation by a more particular and minute examination as to parts of the written statement in question, without affording grounds for the objection that had been made; and, adverting to the circumstances disclosed, the Lord Chancellor said he was far from thinking that such an examination would not be proper. The only doubt, and it is one on which I should like to hear more from the counsel on both sides, is, as to the authority of this Court to commit. Until the discussion on the other part of this question had proceeded to a considerable length, I certainly had no doubt on the authority of this Court to commit, on an adjourned examination; but, I confess, on looking more particularly into the statute, that opinion has been considerably staggered. Under the new act this Court is to exercise all the authority which the Chancellor had in bankruptcy, "except as therein is otherwise provided." (a) Then by the 6th section it is enacted, "that the six Commissioners may be formed into two Subdivision Courts, consisting of three Commissioners for each Court, for hearing and determining the matters and things, and making the examinations hereinafter referred to; and all references and adjournments by a single Commissioner to a Subdivision Court, by virtue of this act, shall be to the Subdivision Court to which he belongs." And by the 7th clause the act gives to each Commissioner all the powers formerly executed by the old Commissioners, except that a single Commissioner shall not have power to commit, otherwise than to the custody of the messenger. I therefore think that this case ought to return to the Commissioner, and be by him referred to a Subdivision Court.

(a) 1 & 2 Will. 4. c. 56. s. 2.

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—
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HEATH.

Mr. *Ching* referred to the 21st section, which, in conjunction with the 2d section, seemed to him to place the question of jurisdiction beyond a doubt. But it being understood that the same point might arise in the following cases of *Re Feaks* and *Re Smith*, and that the question of jurisdiction might be then fully discussed,

The case stood over.

Note.—The case was ultimately referred back to Mr. Commissioner *Fonblanque*, and was by him referred to the Subdivision Court, composed of Mr. Commissioner *Merivale*, Mr. Commissioner *Fonblanque*, and Mr. Commissioner *Holroyd*. The same line of arguments was there urged *pro* and *con.*, and the bankrupt still refusing to answer the question, he was, on the 20th February, committed to Newgate: but he subsequently submitted to answer the question, and was discharged.

Southampton
Buildings,
February 12.

In the matter of FEAKS.

A bankrupt is bound to disclose his property, although his answer may tend to convict him of concealing his effects.

THE bankrupt's last examination in this matter had been adjourned by Mr. Commissioner *Evans* to the Court of Review, under the following circumstances. It appeared, that when he attended the Commissioner to pass his examination, an imputation was made against him of concealing part of his property; and several witnesses were called in support of the charge, who contradicted some of the statements made by the bankrupt. After the examination of these witnesses, the bankrupt was again examined by the Commissioner, and was in fact the last person examined on that occasion. The counsel who attended on the part of the adverse creditors then applied to the Commissioner to commit the bankrupt; while the bankrupt's counsel urged the Commissioner to pass

his examination. The Commissioner, however, did neither one nor the other, but adjourned the *whole matter* to the Court of Review, under the provisions of the Bankruptcy Court Act, 1 & 2 Will. 4. c. 56. s. 30. The bankrupt accordingly was in attendance before the Court this day, pursuant to such adjournment.

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In re
FRANK.

Mr. *M. D. Hill* now applied, on behalf of the adverse creditors, for permission to examine the bankrupt further as to the imputed concealment of his property, having had no opportunity of interrogating him since the examination of the witnesses who had been examined before the Commissioner.

Mr. *Montagu* and Mr. *Crowder*, who appeared for the bankrupt, objected to this proceeding. The 30th section of the Bankruptcy Court Act, in giving the Commissioner power to adjourn the examination of the bankrupt, merely intends such adjournment for the purpose of the bankrupt completing his last examination. Now the question before the Commissioner, and which he has adjourned to this Court, is not a question as to the bankrupt completing his last examination; but a question whether the bankrupt ought to be committed, and this, too, upon the testimony of third persons. But it has been decided in *re Goodwin* (a), that the examination of a third person by Commissioners, is not evidence for the formation of their judgment, as to the correctness or incorrectness of the answers of a bankrupt or witness who is examined before them, but merely a brief to enable them to

(a) 1 Mont. 304.

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In re
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interrogate the bankrupt or witness. Besides, the Commissioner has in this case not referred the bankrupt's last examination to this Court, but has referred the *whole matter*, which he had no authority to do.

ERSKINE, C. J.—The subject that occupied the attention of the Commissioner, when he made the order of adjournment, was the examination of the bankrupt; and when the order states a reference of the whole matter, it must necessarily mean the examination of the bankrupt; that being the only matter previously specified in the order.

Sir J. CROSS.—The Commissioner has certainly no authority to adjourn any thing to this Court but the examination of the bankrupt; and, therefore, we are bound to infer, that when the Commissioner adjourned the matter for the consideration of this Court, he did not adjourn any thing but what he had authority to do. The statute has left it to the discretion of the Commissioner to adjourn the examination, either to this Court, or the Subdivision Court. I do not, therefore, question the discretion of the Commissioner to adjourn any examination which he may think advisable to the Court of Review. But, with the greatest respect to the Commissioner, I should wish it to be referred back to him to consider, whether the examination in this case might not have been, with greater convenience, adjourned to the Subdivision Court, where he might himself attend, and have the assistance of his two brother Commissioners. Here, we cannot arrive at a proper knowledge of the facts, without beginning the examination *de novo*; and after the time that has been

spent in examining the bankrupt before the Commissioner, we must necessarily be occupied as long in this Court in coming to the same point of examination which the Commissioner had arrived at. There is another question, too, worthy of consideration, and that is, supposing in the result we were to commit the bankrupt for not answering satisfactory, whether, as this Court is a superior Court of record, the bankrupt would be entitled to his *habeas corpus*.

1833.

In re
FEAKS.

Sir G. ROSE.—I am disposed to think that the Commissioner might have read over the bankrupt's own examination to him, and have asked him if he had any thing further to say, and might then have acted upon the testimony of the witnesses, if they had been examined in the presence of the bankrupt; and I think there is a distinction in that respect between this case and the case of *Goodwin (a)*, which has been cited in the argument. I certainly have known the examination of another party to have been embodied in the examination of the bankrupt, without any objection taken to that mode of proceeding, on questions of *habeas corpus* which have come before the Lord Chancellor, where the examination of the other party was taken in the bankrupt's presence. And in this case, the witnesses having been examined before the Commissioner in the presence of the bankrupt, he has had full opportunity of examining them, so as to justify the Commissioner in acting upon their testimony.

The matter having been adjourned to this day, to enable the Court to confer with the Commissioner on the subject, the Chief Judge now said, that he had conferred with the Commissioner, and the Court

February 15.

(a) 1 Mont. 304.

1833.

In re
FEARNS.

thought that the examination of the bankrupt should return to him; as it was probable that a requisition might be made for the committal of the bankrupt, which the Court was of opinion that it possessed no power to comply with.

Southampton
Buildings,
February 13.

In the matter of SMITH.

A bankrupt is bound to answer touching his estate, although his answer may tend to convict him of perjury on a former occasion, and of concealing his effects.

Cross, J. dissent. on the ground of the assignee's motive in putting the question.

THIS was another case of the examination of a bankrupt adjourned by the Commissioner to this Court. It appeared, that in the course of his examination before the Commissioner, the following questions were put to the bankrupt.

"The book numbered $\frac{1}{3}\frac{1}{1}$ mentioned in your last examination of the 5th instant being now before you, does it not appear by the castings therein, of payments entered as made by you, to amount to the sum of 55,374*l.* 11*s.* 8*d.*?"

Answer: "Yes."

Question: "Assuming those castings to be true, is that a just and true statement of the amount of the payments made by you in the course of your ten months trading?"

The solicitor, who put this question to the bankrupt, having stated to the Commissioner, that his object was to show that the bankrupt had not upon his last examination made a full and complete discovery of his estate and effects; the bankrupt objected to answer the question, because it would tend directly to criminate himself.

Mr. Ching, who with Mr. Bethell appeared for the

opposing creditor, now repeated the question to the bankrupt; who first said, he was not afraid of answering the question, as he had already given a true account in his former examination, but he afterwards persisted in the objection he took before the Commissioner.

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In re
SMITH.

They then contended that the bankrupt was bound to answer this question. The 36th section of the 6 Geo. 4. c. 16. contemplated the possibility of such a question as this, by declaring that it shall be lawful for the Commissioner to examine the bankrupt upon oath, "touching all matters relating either to his trade, dealings, or estate, or which may tend to disclose any *secret grant, conveyance, or concealment* of his lands, tenements, goods, money, or debts." It may be contended on the other side, that the 39th section, which relates to the proceedings on a *habeas corpus* brought by any party committed by the Commissioners, and directing the Court or Judge to recommit the party, unless it be shown that he has fully answered "all *lawful* questions put to him by the Commissioners,"—restricts, by the use of the term "lawful," the operation of the 36th section. But where any clause of a statute is express and positive in its directions, every thing directed to be done by it must be taken to be lawful. And the subsequent sections of the act make the matter clear. For the 112th section declares the bankrupt "to be guilty of felony, if he does not discover all his real or personal estate, and how and to whom, upon what consideration, and when he disposed of, assigned, or transferred any of such estate, and all books, papers, and writings relating thereunto." And the 130th section declares, that the bankrupt shall not be entitled to his certificate, "if he shall have con-

1833.

In re
SMITH.

cealed property to the value of 10% or upwards." In *Ex parte Nowlan* (a), where the bankrupt was committed for not answering a question, the answer to which might make him confess a felony, Lord *Eldon*, in delivering his judgment, says, that the Commissioners appear to have gone upon this ground, "that the bankrupt was bound to tell them whether he had committed a capital felony, or not." And his lordship added, "if they are right in that, I cannot deliver him upon any such consideration, as that farther examination can be of no use to the creditors; for, if the commitment is legal, I am bound." And the result of that case was, that no order was made for the bankrupt's discharge. There is a difference between a question, the answer to which may involve a positive admission of guilt, and one to which the answer may only *tend to criminate* the bankrupt. This distinction is recognized in *Ex parte Cossens* (b), where it was held by Lord *Eldon*, that a bankrupt could not refuse to discover the particulars relating to his estate and effects, although such information might *tend* to show that he had committed a criminal act. The case of *Ex parte Kirby* (c) may be relied on by the other side; but the document to which the question referred in that case was a statement of a gross fraud that had been practised by the bankrupt, and if he had admitted in the terms of the question proposed to him "that the statements contained in that document were true statements," he would at once have confessed himself guilty of the fraud. And the ground, too, on which the Lord Chancellor's judgment proceeded in that case was, that the question was multifarious. Now, the

(a) 11 Ves. 510.

(b) Buck, 531.

(c) Mont. & M. 212.

answer to the question insisted upon in this case involves no admission of any positive felony, or fraud. For it does not follow, because the statement made by the bankrupt in his former examination was false, that he must necessarily be a criminal. The omitting to make a full discovery of his estate and effects, would not render him a criminal, unless it was accompanied with a *malus animus*, or intent to defraud. In *Ex parte Meymott* (a), Lord *Hardwicke* assumes that the Commissioners have power to examine a bankrupt, although the examination might subject him to penalties. And in *Pratt's* case (b), the Court said that the bankrupt was bound to disclose all circumstances respecting his property, be the consequences what they might.

1833.

In re
SMITH.

Mr. *J. Russell* for the bankrupt. The solicitor, when the question was put to the bankrupt, expressly said, that his intention in putting the question was, that the bankrupt had not on the former examination made a full and complete discovery of his estate and effects. Now, upon an indictment against a bankrupt for concealing his effects, would it not be enough to show that he had not made a full and complete discovery, and leave it to the jury to decide upon the *animus* that induced the concealment? If the bankrupt, therefore, is liable to be indicted for neglecting to make a full discovery of his effects, he had in this case a good reason for refusing to answer the question that was put to him; for a man is not bound to answer any question that may subject him to an indictment. In *Ex parte Kirby* (c) Lord *Lyndhurst* says, “there is

(a) 1 Atk. 196.

(b) 1 G. & J. 58.

(c) Mont. & M. 229.

1833.

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not any authority to show that the Commissioners may dispense with the general rule of law, that no person can be compelled to criminate himself; and although part of the question proposed is free from this objection, yet as it is blended with part, which, if taken separately, the bankrupt would not have been compelled to answer, I am of opinion that to the question, in the very general form in which it was proposed, the bankrupt was entitled to demur." [Sir G. Rose, Assuming the question to relate to the *estate and effects* of the bankrupt, the point we have now to decide is, whether, after what Lord Eldon said in *Ex parte Cossens*, the bankrupt can refuse to answer the question, because it may *tend* only to criminate himself.] There is no dictum of Lord Eldon, which bears out the inference that the bankrupt must answer a question which may tend to convict him of an indictable offence. If the bankrupt is asked, whether he has made a full and true disclosure and discovery of his estate and effects, he is justified in declining to answer the question; because the intent to defraud his creditors would be inferred, if he answered that he had not.

Mr. Ching in reply. The examination of a bankrupt being taken for the sole purpose of discovering his estate and effects, this Court, which retains the control over all the proceedings, would not permit an examination thus taken *alio intuitu*, namely, for the discovery of his property, to be made use of as a confession, for the purpose of convicting him on the trial of an indictment for concealing his effects.

ERSKINE, C. J.—If I could consider this as an

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examination, the object of which was to involve the bankrupt in criminality, without any intention to discover his estate and effects, I should pause before I should say it was lawful to put the question which the bankrupt has demurred to. But the way in which I look at the question is this,—that the assignees, for the sole purpose of discovering the bankrupt's property, ask him whether a certain account of payments contained in one of his books, which had been referred to by him in his former examination, was a just and true account; and the bankrupt refuses to answer the question, because, he says, it may tend to criminate himself. The question, therefore, which we have now to decide, is, whether this is a lawful objection taken by the bankrupt. The section of the Bankrupt Act (*a*), which enables the Commissioners to have the bankrupt brought up before them for examination, is the 36th section, and the words used in it are very large; for it declares that it shall be lawful for the Commissioners to examine the bankrupt upon oath "touching all matters relating either to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or *concealment* of his lands, tenements, goods, money, or debts." It has been objected, on his behalf, that if he did not give a true account at his former examination, he would not have made a full disclosure and discovery of his estate and effects, and that the omission to do so would render him liable to a criminal prosecution; and consequently that he was not bound to answer the question, which if his answer had been in the negative, would have involved him in a criminal proceeding. No doubt, the general rule

(*a*) 6 Geo. 4. c. 16.

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of law is, that a man is not bound to answer a question, which may criminate himself. But look at this clause of the Bankrupt Act, which expressly declares, that a bankrupt may be examined as to what may *tend* to a discovery of his effects. Even after the bankrupt has obtained his certificate, the statute says he may be interrogated as to any concealment of his property. And what Lord *Eldon* says in *Ex parte Cossens* (a) confirms me in the view I take of the present question. (His Honor then cited the passage from Lord *Eldon's* judgment which he had cited in the previous case, in the matter of *Heath* (b)). For these reasons, therefore, I am of opinion that the bankrupt in this case is bound to answer the question that has been put to him, or he must take the consequences of his refusal.

Sir J. CROSS.—I must own, that when I first heard this question propounded to the bankrupt, coupled with the avowed object as stated to the Commissioner, it was with no small feeling of surprise. There is no doubt that the bankrupt may be further examined touching the disclosure and discovery of his estate and effects, although he has passed his last examination; but if I had been sitting as a Commissioner on that occasion, I should certainly have thought it my duty to ask the party examining, what is your object in this inquiry? And if the avowed object was to show, that the bankrupt in his last examination had sworn falsely—had committed perjury or felony—I should instantly have dismissed the inquiry. The argument, as I have collected it in the course of this discussion, has proceeded on the ground of a right to examine the bank-

(a) Buck, 540.

(b) See ante, p. 214.

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rupt, for the purpose of showing that he has sworn falsely. And if I am right in that conjecture, I think the Court itself ought to have interposed the objection that has been made by the bankrupt's counsel. Suppose the Commissioner had adjourned the examination to a Subdivision Court, and after being committed by that Court for not answering the question, he had been brought up here on a *habeas corpus*, which would have made it necessary that the question should have been specified in the return of the warrant of commitment—would not this Court, or any Court of Westminster Hall, have made an order for the discharge of the bankrupt from such a commitment? It has been said, that in *Kirby's* case the ground of the Lord Chancellor's decision was, that the question was multifarious. But it appears to me that the question in this case is much more multifarious. There is another objection also to the terms of this question, referring as it does to a bye-gone inquiry. The bankrupt is not, upon a second examination, to be asked the same question put to him in a former one,—that is, whether the answer given by him to the former question is true,—for the purpose of making him contradict himself, and showing that he swore falsely on his previous examination. I say, that the question proposed, with the object as avowed by the assignees, is not for a legitimate object. If they have a legitimate object in pursuing this inquiry, let them come before the Court and state such object. But here the avowed object was, to show that the bankrupt had not upon his last examination made a full and complete discovery of his estate and effects—the Commissioner has returned the examination, stating in plain terms that such was the avowed object of the

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inquiry—and I have never heard, through the whole of this discussion, that that object was retracted.

Sir G. ROSE.—I perfectly agree with my learned colleague, that if we saw upon this examination nothing but a vindictive object, the question put to the bankrupt would not in that case be a lawful question. But when I find, from the whole tenor of the bankrupt's previous examination, that the inquiry has been instituted with a legitimate object, namely, to discover the whole of the bankrupt's estate and effects, I must give the assignees credit for pursuing that inquiry for the same lawful purpose. I should certainly not be inclined to impute improper motives to assignees, for endeavouring, in the course of their duty as trustees for the general creditors, to obtain a disclosure from the bankrupt of the whole of his property. The Court is relieved on the present occasion from the former difficulties, as to the extent of the Commissioners' authority in examining the bankrupt. For the cases cited in the argument have not trenched upon the question, that a witness is to be protected from answering questions that may only *tend* to criminate himself. And when I find that the statute has thrown upon the Commissioners the duty of examining the bankrupt "touching all matters relating either to his trade, dealings, or estate, or which may *tend* to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts,"—creating thus a distinction as to the common law principle, that a witness may refuse to answer questions which may tend to criminate himself;—when I find too, that Lord Eldon has decided in several cases, that the bankrupt is bound

to answer all questions which relate to his estate,—I am the more confirmed in the opinion I entertain, that the bankrupt in this case has no right to refuse to answer the question put to him, by sheltering himself under the plea that his answer may *tend* to criminate himself. The statute expressly declares, that the bankrupt is only guilty of a felony in concealing his effects, when the concealment is, *with intent to defraud his creditors*. If the bankrupt now asserts that his concealment was fraudulent, he may then, certainly, have a right to say, “I will not answer a question, which may convict me on an indictment.” But let the bankrupt take the consequences of such a refusal, for he will ever afterwards forfeit all the benefit he might derive from his commission, and would never obtain his certificate.

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The COURT, therefore, overruled the objection, and remanded the bankrupt for examination before the Commissioner.

Sir G. ROSE, on the following day, said, that he had looked into his note of what occurred on the hearing of the case of *Ex parte Kirby (a)*, in which he happened to be engaged as counsel, and that he found what he stated yesterday was correct, namely, that Lord Lyndhurst allowed the *habeas corpus*, not merely because the question proposed to the bankrupt was multifarious, but because he thought the answer to the question would *directly criminate* the bankrupt upon a prosecution against him then pending for a conspiracy, with intent to defraud.

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(a) Mont. & M. 212.

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A bill-broker, in order to get a bill discounted at 4 per cent., takes upon himself the responsibility of indorser, and charges his principal 5 per cent. discount, which is the lowest sum at which he could have done the business, except for his indorsement:—Held, that although he also charged 10s. per cent. for his trouble, &c. it was not usury (a).

Ex parte EDWARD GOSS.—In the matter of CHARLES WESSEN.

THE fiat in this bankruptcy issued on the 6th August 1832, and the petitioner was a bill-broker residing in the city of Bristol. In May 1832 the bankrupt applied to the petitioner in his character of bill-broker, and proposed to him to procure to be discounted for him a bill of exchange; the petitioner having previously informed him that his charges for brokerage, for trouble and expense in procuring bills to be discounted, was 10s. per cent. on the amount, which the bankrupt agreed to pay. In the months of May, June, and July, 1832, the bankrupt requested him to procure five bills of exchange, drawn by the bankrupt and accepted by other persons, payable in London, to be discounted; namely, a bill dated 5th May 1832, for 139*l.* 16s., accepted by *Charles Thomas*, at three months; another, dated 1st June 1832, for 120*l.*, accepted by *James Huxtable*, at two months; another, dated 4th July 1832, for 200*l.*, accepted by *Charles Thomas*, at two months; another, dated 12th July 1832, for 70*l.*, accepted by *Thomas Darker*, at three months; and another, dated 14th July 1832, for 49*l.*, accepted by *J. Rose*, at two months. These bills the petitioner caused to be discounted, some by the Gloucestershire bank, in the city of Gloucester, (about 34 miles from Bristol,) and some by Messrs. *Nicholson*, residing in the town of Kingsbridge, (about 90 miles from Bristol,) and the others by Messrs. *Saunderson & Co.* in London; and the petitioner deducted legal discount at 5 per cent., and the commission of 10s. per cent. on the whole

(a) See also *Kent v. Loren*, 1 Camp. 177.

amount, viz. 578*l.* 16*s.* And the petitioner, when the bills were respectively discounted, paid the bankrupt the full amount, (less such discount and commission,) as to part of the amount, in money, and as to the residue thereof, at the particular request of the bankrupt, for his (the bankrupt's) then accommodation, and as a full equivalent (for cash), by goods, and by undeniable bills indorsed by bankers, payable at future times, (and all which were paid) allowing the bankrupt legal interest at 4 per cent., for the time such bills had to run. As surety for the bankrupt, and as an inducement to the other parties to discount the five several bills, and without which he could not have obtained the discount, the petitioner indorsed them, and retained 1 per cent. out of the 5 per cent. as his *del credere* commission for such indorsement, the several banks discounting bills with his indorsement on them at 4 per cent. discount. The five bills were all dishonoured, (notice of which was given to the bankrupt) and the petitioner was obliged to take them up.

On the 18th July 1832 the bankrupt told the petitioner that he was going to London, where he had some money to pay, and requested the petitioner to accommodate him with an advance, proposing to take bills from the petitioner, which he said would do as well as cash; and the petitioner indorsed to the bankrupt two bills for 50*l.* each (since duly paid), upon which the bankrupt paid the petitioner 40*l.* in cash, and gave him an I O U for 60*l.*; and it was expressly agreed, that the subject of interest upon the transaction should be settled upon the bankrupt's return from London; but this was never done. The interest on the two bills amounted to 1*l.* 2*s.* 9*d.* At the bank-

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ruptcy, the petitioner stood a creditor for 578*l.* 16*s.*, (the amount of the five bills), and the 60*l.*, less the sum of 1*l.* 2*s.* 9*d.* the interest on the two bills for 50*l.* each, making the sum 58*l.* 17*s.* 3*d.* The petitioner applied at a Gazette meeting to prove these sums due; but proof was refused, on the ground that he discounted the five bills on his own account, and not as a bill broker, and had therefore been guilty of usury. No dividend had been declared.

The petition prayed liberty to prove and for costs.

Mr. *O. Anderdon* and Mr. *Bacon* for the petitioner. In all the cases in the books on this subject it is laid down as an undoubted rule, that on the procuring bills to be discounted, it is not usurious for bankers to super-add to the amount of discount, a charge in respect of commission for trouble and expense; although, taken together, the discount and commission exceed the rate of 5 per cent. In *Carstairs v. Stein* (a), whether a commission of 10*s.* per cent. upon a banking account be usurious or not, was held to be a question for the jury, depending upon whether it may be ascribed to a reasonable remuneration for trouble and expense, or whether it be a colour for usury upon the loan of money. And in that case it was held, that on a contrariety of evidence upon that point, the Court would not disturb the verdict of a jury finding such commission was not usurious,—although the verdict were against the opinion and direction of the judge who tried the cause,—unless it appeared clearly that the jury had drawn an erroneous conclusion. The same point was decided in *Masterman v. Cowrie* (b), and *Hammett v. Yea* (c); which last case over-

(a) 4 M. & S. 192.

(b) 3 Camp. 488.

(c) 1 Bos. & P. 144.

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ruled all Lord *Kenyon's* decisions on this subject, expressly deciding that such commission is, in the opinion of juries (at least), a reasonable charge, and absolutely necessary to the carrying on of that kind of business. The allowance of such commission is not confined to bankers alone, but extends to merchants and traders generally; and there is no principle on which it ought not to be extended to brokers. It is the brokerage, the trouble of negotiation, that founds the title to remuneration, and not the mere appendages of the counter of a banking or other establishment. A man may have just as much trouble without an expensive establishment,—as for instance a bill broker,—or without holding a strictly mercantile character. This is not the case of a man lending his own money to another upon his promissory note; but is a transaction of procuring cash for another, and of taking mercantile paper in exchange, necessarily involving a variety of hazards and trouble; and in all such cases 10*s.* per cent. seems to have been adopted as a reasonable commission. Now, although the bills were discounted at 4 per cent., and the petitioner charged the bankrupt discount at the rate of 5 per cent., yet the extra one per cent. he had a right to appropriate to himself as *del credere* commission. Without the petitioner's indorsement, it is proved that he could not have obtained discount; and having taken upon himself the responsibility attaching to the character of indorser, he is surely entitled to a reasonable advantage. In *Lee q. t. v. Cass (a)*, had there been any doubt of the solvency of the acceptor, the commission of 3½ per cent. would have been allowed to a party who took upon himself a responsibility similar

(a) 1 Taunt. 511.

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to that in the present case, and charged $3\frac{1}{2}$ per cent. in consideration of that act; but on evidence of the contrary, namely, that the acceptor was known to be in good circumstances, and his credit unimpeached, it was held to be a mere colourable shift. So in this case would it be, were it not established in evidence before the Court beyond a doubt, that without his guarantee by indorsement the bills could not have been discounted at less than 5 per cent. The present is, therefore, a case in which the bankrupt is in nowise injured by the petitioner taking to himself the 1 per cent. as his *del credere* commission, since he must at all events have paid the 5 per cent. And even if it be regarded as an advance to the bankrupt, out of the funds of the petitioner, he is not to be looked upon as a mere individual advancing money, (in which case we admit he could not be entitled to commission); but he is entitled to stand before the Court in his mercantile character as a bill broker, and is equally entitled to commission as bankers are.

As to the mode in which the petitioner paid the bankrupt the amount of the bills discounted, namely, in part by bills, accepted payable in London, and for which the petitioner allowed only 4 per cent. rebate of interest,—there was nothing usurious in that part of the transaction; for although he charged 5 per cent. discount for the bankrupt's bills, which is proved to be according to their value, it is also proved, that the bills given in exchange were discountable at 4 per cent., and therefore an equivalent in value was given. It is like the common case where a needy man goes to borrow money of a silversmith, and in order to realize the cash, receives goods from him, for which the silversmith charges his price, and the borrower sells the

goods and puts up with the loss. There the only question ever raised in Courts of law or equity is, whether the goods are of an equivalent value to the price set upon them by the silversmith; and if so, the transaction cannot be impeached. On the whole, we contend, that if this is decided to be a loan of the petitioner's money, he is entitled to charge 10s. per cent., according to the case of *Masterman and Cowrie*; and if held to have been done under the character of bill-broker, he is entitled equally to the 10s. commission, and also to the charge of 1l. per cent. as his *del credere* commission, and that there being no case of usury established, the petitioner is entitled to the proof sought for by the petition.

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Mr. *Swanston* for the respondents. The manner in which the circumstances of this transaction are put together, clearly stamps it as a mere mask on the part of the petitioner, in order to gain more than legal interest; and connecting the facts of the charge of 5 per cent. discount, and 10s. commission, with the subsequent allowance of only 4 per cent. rebate of interest on the bills which were given in payment of those which were discounted, the matter is placed beyond a doubt. There is also great obscurity as to the real nature of the transaction, arising out of the mode in which the petitioner has stated his case. In the petition he states himself to be a mere bill-broker; while, from some of his affidavits, it appears that he transacted the business as discounteer with his own money. If he acted in the capacity of bill-broker, then he was not entitled to the 1 per cent., the bankers having discounted the bills for 4 per cent.: and he ought to have accounted for that

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1 per cent. in the same manner as every other agent, who would not be allowed to take such an advantage over, and such additional profit against, his principal. If he acted as the discounters on his own individual account, he has no right to the charge of any commission above 5 per cent., the legal interest. But, besides this, it is, by 12 *Anne*, stat. 2. c. 16. s. 2. declared illegal for any broker to take a higher commission than $\frac{1}{4}$ per cent., and he is liable to the penalty of 20*l.* for every offence.

Mr. *Anderdon* in reply was stopped by the Court.

ERSKINE, C. J.—I cannot say that the facts, either on one side or the other, are so clearly made out as to leave my mind without hesitation; but looking at the evidence as a jury would regard it, and exercising my judgment upon the whole merits that are disclosed to the Court, I feel myself warranted in saying that the usurious contract is not made out.

Two grounds are taken by the respondents in resistance of the petitioner's claim. The first of these is, that the petitioner took 10*s.* for commission beyond the legal interest of 5 per cent. Now if this were made out to have been done as a mere contrivance to obtain more than 5 per cent., however the Court might think a compensation reasonable, yet the law must have taken its course, and the whole claim of the petitioner must have been forfeited, on the ground of usury. But in answer to this the petitioner says he took the commission for the trouble of his arrangements, and for the expenses in providing the advance of money on the bills. The cases in which a commission has been allowed are certainly those of bankers, and in those cases the reason-

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ableness of the amount has been weighed by the custom, which has grown up in such dealings. But it does not follow that every person is entitled to the charge of commission; for if it were the case of a party advancing his money as a mere capitalist, and not in his mercantile character, the Court would hardly find any ground to support such a transaction as reasonable. In this case, however, it seems that the petitioner has *bonâ fide* had considerable trouble in the negotiation: in fact, it is sworn to be his trade; and although the extent to which he carried on the trade does not in any degree appear, yet the evidence on this part of the case is so strong, that I could not be justified in saying that this transaction was nothing but a mere cloak or shift for usury.

Then it is said, that the petitioner obtained the bills to be discounted at 4 per cent.; but there the material circumstance is, that he indorsed them, and thereby rendered himself liable. It is proved that he could not otherwise than by such indorsement obtain a discount of less than 5 per cent.; and he takes the 1 per cent. as his remuneration, or *del credere* commission, for giving his guarantee. This, I think, appears to be a fair and *bonâ fide* explanation, and a transaction fully justified in principle by the case of *Lee q. t. v. Cass (a)*; and one by which, under the circumstances, the bankrupt could not be injured, as his bills were not discountable at less than 5 per cent., without the petitioner's indorsement.

But then again it is said, that although he charged the bankrupt with discount at the rate of 5 per cent., yet on the bills which he paid to the bankrupt in lieu of cash, which had some time to run, he only allowed

(a) 1 Taunt. 511.

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him a rebate of 4 per cent. In this, I think, there is no evidence of usurious contract or unfair advantage over the bankrupt; for it is in evidence that they were discountable at that rate, although the bankrupt's bills were not. It was purely a question of comparative value; and the giving of those bills in lieu of cash was not the consequence of any prior contract, but arose out of the request of the bankrupt, and was as great a convenience to the bankrupt as to the petitioner. With respect to the statute of *Anne*, which Mr. *Swanston* referred to,—although it inflicts a penalty, yet as it does not invalidate the transaction, I think it has no bearing upon the present question. Therefore, on these grounds, I am clearly of opinion that there is no evidence of any colourable transaction to obtain usurious interest.

Sir JOHN CROSS.—The difficulty I have had in this case is, that the petitioner appears to shift his ground; for in his petition he states himself to have transacted the affair in the mere character of bill-broker, while in his affidavits he seems to state that he advanced the money from his own pocket. I am rather inclined to give credence to the latter explanation, and therefore am, perhaps, disposed in this part of the case to differ from my learned colleagues, although we all arrive at the unanimous opinion that this is not usury: and looking at it in this view, the question is, whether the taking of interest at 5 per cent. and 10s. commission is usurious? I think not. Usury must arise out of a previous contract; it must be proved by distinct evidence; for it is contrary to every principle of law to presume the existence of fraud; and Courts have always been astute in pronouncing against so severe a penalty, as is the

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consequence of usury. I cannot bring my mind to regard a discount of a bill as a mere lender of money on his own account, and therefore not capable of charging commission. If *A.* comes to *B.* and says, "I have 100*l.* which is payable to me in two months' time, will you, *B.*, take the bill and discount it?"—which is agreed upon—*B.* has in this single transaction all the risk and trouble and duty of a regular mercantile house, and I think it reasonable he should have a fair and reasonable remuneration in the shape of commission, as much as a banker has under similar circumstances. Besides, as a mere lender of money, he would have his right to claim his debt against the borrower unlimited and unrestrained; but, as a bill-holder, he might be exposed to great inconvenience in recovering the payment in London or elsewhere, and be confined to his remedy, in a great measure, upon the bill. For these reasons I also think the proof should be admitted.

Sir G. Rose.—We have in this case to exercise the province of a jury upon a question arising on a point of law, disposing of the facts. On the result of evidence before us, we have to decide the existence of an usurious contract. Now, in a case like the present, we must not lose sight of the strong feeling that has always existed in the minds of juries in favour of the allowance of a reasonable remuneration for trouble and expense in the negotiation of bills. The habits of business, and the regard to commercial convenience, have been the causes of that feeling; and, I think, Courts are bound by the uniformity of the verdicts of juries upon this class of cases. The result of the case of *Castairs v.*

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Stein (a), where the former law on this subject was much discussed, shows how much judges are now inclined to follow the finding of juries, although the opinions of their predecessors upon this question had been opposed to those of the juries over whom they presided. Without this inclination on the part of judges, the finding of juries would have been irreconcilable with the ruling of judges; and that circumstance has given rise to a concession from the bench, from a due regard to the convenience of the commercial world. The habits of the commercial world require the allowance of such remuneration, and the recognized and universal finding of juries has sanctioned it.

In the case before us the whole question is, in what character did the transaction take place? Was the petitioner a bill-broker, or was he a mere capitalist advancing his money? If it were done in the latter character, I have no hesitation in pronouncing the transaction usurious; for I cannot concede, that the exception in favour of bankers is to be extended to such limits. That it is confined to bankers and brokers, and cannot be extended, is a principle adopted in every case. But, upon the evidence, I find sufficient to satisfy my mind, that it was done in the character of a bill-broker, with a fair and *bonâ fide* intention to reasonable remuneration; and thence I arrive at the conclusion, that there was not any colourable dealing on the part of the petitioner to constitute a case of usury.

The proof was therefore ordered to be admitted, but without costs (b).

(a) 4 M. & S. 192.

(b) See also *Ex parte Gwyn*, ante, 12.

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Ex parte WILLIAM MYERS, WILLIAM TAYLOR, JOHN EWART, and JOSEPH CHRISTOPHER EWART.—In the matter of HENRY SUDELL.

Southampton
Buildings,
February 11.

THIS was the petition of creditors, carrying on the business of brokers at London, under the firm of *Ewart Taylor & Co.*, for the proof of 6161*l.* 1*s.* 8*d.*, alleged to be due from the bankrupt to the petitioners, under the following circumstances.

The bankrupt, previous to his bankruptcy,—the commission having issued against him on the 7th August 1827,—carried on considerable business as a merchant, at Blackburn, in Lancashire, and had extensive dealings with the petitioners; which dealings consisted of pecuniary advances made to the bankrupt by the petitioners. The claim was founded on a written guarantee given by the bankrupt to the petitioners, in the following terms:—

“ Woodfold Park, 8th November 1823.

“ Messrs. *Ewart, Myers & Co.*

“ Gentlemen,—In consideration of your allowing Messrs. *Lyne* and *Thomas Sudell* to draw upon you to the extent of 12,000*l.*, and your accepting three drafts accordingly, but so as for them not to leave more than that sum running upon you at one period, I hereby guarantee to you that amount; it being distinctly understood, that payment of these drafts is to be provided for *either by myself, or Messrs. William Lyne or Thomas Sudell*, in direct discountable bills, 14 days at the least before they fall due; and I also guarantee the due payment of all remittances made to you by Messrs. *William Lyne* and *Thomas Sudell*. I cannot

In consideration of *A.* allowing *B.* to draw upon him, and accepting his drafts, *C.* guarantees to him the payment of the amount of all such acceptances. *C.* becomes bankrupt, when the acceptances are not yet due. Held, that after the acceptances have become due, and *B.* has neglected to provide for them, *A.* is entitled to prove the amount against *C.*'s estate, under the 6 *Geo.* 4. c. 16. s. 56.

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conclude this letter without expressing my thanks for your confidence; and with the hope that the arrangement will be advantageous, I remain, gentlemen, very respectfully, your obedient servant,

“ *Henry Sudell.*”

William Lyne and *Thomas Sudell*, the parties mentioned in this guarantee, were merchants in copartnership at Liverpool; and in pursuance of such guarantee they from time to time drew bills of exchange upon the petitioners, *Ewart Taylor & Co.*, at three months' date. The last of these bills was dated 4th July 1827, and all of them were duly paid by the petitioners upon the faith of the guarantee. Messrs. *Lyne* and *Sudell* having become bankrupt in September 1827, there was then due to the petitioners, on the guarantee account, the above-mentioned sum of 6161*l.* 1*s.* 8*d.* The petitioners had applied to prove this sum under the commission against *Henry Sudell*, but the Commissioners rejected such proof, on the ground that it was not a contingent debt within the 6 *Geo.* 4. c. 16., and was a claim for damages, which the Commissioners could not assess.

Mr. *Kindersley*, for the petitioners. This was a contingent debt at the time of the bankruptcy of *H. Sudell*, and is therefore proveable after the happening of the contingency, within the provisions of the 56th section of the 6 *Geo.* 4. c. 16. (a), and within the principle laid

(a) The words of the 56th section are as follows:—“ If any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency, which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the Commissioners to set a value upon such debt, and the Commissioners are hereby required to ascertain the value

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down in the case of *Ex parte Tindal* (a). In that case the bankrupt, by marriage settlement, covenanted to cause 4000*l.* to be paid to his wife's trustees within twelve months after his decease, in trust to pay her the interest for her life, in case she survived him, and afterwards the principal to their children; but if they had no children, to the survivor of the bankrupt and his wife, his or her executors or administrators; and it was held, that this was a debt payable on a contingency, and proveable under the commission. Now although the claim of the petitioners in this case was contingent at the bankruptcy of *H. Sudell*, there could be no inability of the Commissioners to assess the amount due to the petitioners; inasmuch as, from the course of dealing with *H. Sudell*, he became their debtor for the bills accepted by the petitioners, at the times such bills were accepted. [Sir *J. Cross*. Had there been any default before the bankruptcy, so as to make the guarantee proveable under the commission? Or does the 56th section of the Bankrupt Act extend to debts which are incapable of valuation? And can you contend that this guarantee by *H. Sudell*, to make good the deficiencies of *Lyne* and *Sudell*, was capable of valuation at the time of *H. Sudell's* bankruptcy?]

Mr. *Montagu* and Mr. *G. Richards*, for the assig-

thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

(a) 8 Bingh. 402.

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nees. With respect to this claim of the petitioners on the guarantee, there was no debt contracted payable on a contingency within the meaning of the 56th section of the Bankrupt Act; and nothing that occurs afterwards can make it a debt, if it was not so before. There is a great difference between a debt payable on a contingency, and a contingency whether a claim will ever become a debt. The case of *Yallop v. Ebers* (a) is a strong authority against the right of proof claimed by the petitioners. That was an action of assumpsit for not indemnifying the plaintiff against the payment of a bill of exchange under the following circumstances. The defendant, on certain considerations, undertook to pay the balance due on the bill, of which the plaintiff was acceptor; and he afterwards, by a new undertaking, engaged to deliver up the acceptance to the plaintiff within a month, or to indemnify him against it. The defendant became bankrupt, and did not pay or give any indemnity; and the plaintiff was obliged to take up the bill, the defendant having then obtained his certificate. It was held, under these circumstances, that the plaintiff could not have proved in respect of this promise under the defendant's commission, either for a debt not payable at the time of the bankruptcy, or for a contingent debt, or in the character of a surety,—and therefore that the bankruptcy was no defence. The same principle was acted on in the case of *Atwood v. Partridge* (b), where the bankrupt had covenanted for the due payment by *A. B.* of a premium upon a policy of insurance, which had been effected to secure a debt due from *A. B.* to the plaintiff. The premium became due on

(a) 1 B. & Adol. 698.

(b) 4 Bing. 209.

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the 17th June, and being unpaid by *A. B.*, or the bankrupt, was paid by the plaintiff. On the 20th June the bankrupt obtained his certificate; which, it was held, did not discharge him from the amount of the premium, as it was not a debt proveable under the 56th section of the 6 Geo. 4. c. 16., but a mere claim for unliquidated damages. Those who contend that a guarantee like this comes within the 56th section of the Bankrupt Act, must, instead of the word "*debt*," which is mentioned in that section, read the word "*liability*;" for the clause says nothing about a *liability*, but is merely confined to a *debt*. But how can any value be set on a *liability*? Would any actuary be able to calculate it? In *Ex parte Tindal* (a), though the debt there was held to be proveable as a contingent debt, yet the Chief Justice admits there was a difficulty in putting a value upon it. And here the difficulty would be insurmountable, in affixing a value to the liability incurred by this guarantee. In *Ex parte Davis* (b), the contingency depending upon the separation of the husband and wife, and of the widow's not marrying, was held not to be within the 56th section, it not being capable of valuation.

ERSKINE, C. J.—The question comes to this: admitting the debt to have been incapable of valuation before the happening of the contingency, yet after the contingency *has happened*, whether a value cannot now be put upon it.

Mr. Kindersley, in reply. The question is, whether February 15.

(a) 1 Dea. & Chit. 291; S.C. 1 Mont. 375; 8 Bing. 402.

(b) 1 Mont. 297.

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this guarantee by *Sudell* is a *debt* proveable within the intent of the act? Can it be contended with any show of reason, that though the bankrupt is deprived of the whole of his property, yet that there should nevertheless remain pecuniary demands, to which he is to continue liable? The position of this clause in the act throws light upon the intention of the legislature. After various sections providing for proofs under various circumstances,—and amongst them section 53, which permits the creditor to receive a dividend in the case of bottomry and respondentia bonds, where the loss happens after the bankruptcy,—comes the section in question, which was clearly intended to provide for all other kinds of contingencies than those already expressly mentioned.

February 18.

ERSKINE, C. J.—In this case Messrs. *Myers Taylor* and *Ewart* petition to prove against the estate of *Henry Sudell* for the sum of 6161*l.*, for monies lent and advanced on the faith of a guarantee; the proof having been rejected by the Commissioner, this petition is presented praying leave to prove.

It appears, that on the faith of the guarantee several bills were drawn by Messrs. *Lyne* and *Sudell*, all of which were duly paid, except a balance of 6161*l.*, which forms the debt here sought to be proved. The proof is opposed, on the ground that *Henry Sudell* had not contracted any debt when the commission issued, but merely a liability; and that to entitle the petitioners to prove, a mere *liability* is not sufficient, unless there be an actual existing debt. The question arises upon the construction of the 56th section of the 6 *Geo. 4. c. 16. (a)*

(a) See *ante*, p. 252, note.

In this case, the bills were not due when the commission issued, but became so when the proof was tendered before the Commissioners; so that the contingency had then actually happened, on the happening of which the bankrupt was to become liable.

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But it is contended, that this case does not fall within the second branch of the clause, because it could not be brought within the first branch at the time of the bankruptcy; as the contingency was not then capable of valuation by any mode of calculation. I do not think that argument a sound one; being of opinion, that the second branch of the section has reference to the same contract as the first.

Under the 7 Geo. 1. c. 31., such a liability as the present one would not have been proveable under the section making bills proveable, though not due. There is, however, some difference between the words of the two sections; and it might be said, that this gave fair scope for an argument, that the difference was great enough to enable a bill to be proved, even under the 51st section of the 6 Geo. 4., though the bill was not yet due. But it is not necessary to go into the consideration of that point, because I am clearly of opinion, that this debt is proveable under the second branch of the clause.

In *Ex parte Lewis* (a), *A.* advanced 2000*l.* to *B.*, to be repaid on a certain day, and secured by bond of *C.*, conditioned that if *B.* made default in payment on the day named, *C.* should pay in one week. *C.* became bankrupt, and *B.* afterwards made default. It was held, that the debt was proveable under *C.*'s commission. In that case the former one of *Ex parte Grundy* (b)

(a) Mont. & M. 426.

(b) Ibid. 293.

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was referred to, where the question might have been raised, but was not; the counsel conceiving it useless so to do. Both these cases are directly in point, and confirm me in the opinion I entertain, that this debt is proveable under the second branch of the 56th section of the Bankrupt Act. In *Ex parte Grundy* the Lord Chancellor says, the Commissioners are not required, nor is it necessary for them, to set a value upon a contingency which *has* happened.

The whole question in this case appears to be, whether the Commissioners could have set a value upon this debt, or liability, before the happening of the contingency.

Looking into the statute itself, it becomes obvious, from a consideration of the clauses immediately preceding the one now under consideration, that it was not the intent of the legislature to confine parties to matters which were strictly "*debts*," for which an action of debt could be brought; but to let in proof on all kinds of liabilities and dealings, which in equity would end in a debt, on the one hand,—and to release the bankrupt from all manner of claims, on the other. This may be inferred from the words of the 51st section; for though the first words of that section are, "that any person who shall have given credit to the bankrupt upon valuable consideration, for any money," &c. "which shall not have become payable when such bankrupt committed an act of bankruptcy, shall be entitled to prove such debt, as if the same was payable presently, and to receive dividends;"—yet the latter branch, as to interest, says, "deducting only thereout a rebate of interest for what he shall so receive, at the rate of 5 per cent." prior to the time

the debt would have become payable. Now, it is perfectly clear, that all parties to a bill, such as a distant indorsee, might prove against the drawers as for a debt; but it is equally clear, that no action of *debt* would lie. The act contemplates proof on liabilities to be afterwards converted into debts. *Ex parte Tindal* is also an authority for this; for though in the early part of the judgment, Sir N. Tindal shows that an action of debt might in that case have been brought; yet he afterwards adds, "But those authorities are merely as to the form of action, whether it should be *debt*, or covenant; and do not affect the substance of the case, which is, whether a sum of money is payable by the contract."

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The substance of this case is, whether the sum was payable upon a *contingency*, which after circumstances would mature into a *debt*. I never knew it argued before, that the liability under a guarantee was not a *debt*; the objection taken in such cases always has been, as to the contingency, whether too remote, &c., as in *Ex parte Minett* (a) and *Ex parte Garland* (b). I am therefore of opinion, that the proof in this case ought to be admitted.

Sir J. CROSS.—I entirely concur in the judgment pronounced by the Chief Judge (c).

Sir G. ROSE.—I also concur. I never before heard

(a) 14 Ves. 189.

(b) 10 Ves. 110.

(c) His Honor declined giving the reasons, on account of the absence of the counsel on both sides, but afterwards intimated that his concurrence was founded on the point of fact, that the terms of the guarantee, (which are specified in italics ante, p. 251,) made the bankrupt a principal, as well as surety.

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it doubted, that a debt under a guarantee was proveable under a bankruptcy, after the contingency had happened. I may safely assert, that my recollection furnishes fifty cases in which that has been done. In all the cases, from *Ex parte Adney* (a) downwards, it never was objected that a guarantee was not a debt proveable; the doubt as to whether proveable, or not, always depending on the nature of the contingency. The common undertaking to replace bank stock, cannot be called a *debt*; nevertheless it would be proveable, unless one of the terms of the undertaking included some contingency; the reason of which is, that there was a fair equitable undertaking, which ought to be rendered available against the bankrupt's assets.

Another circumstance would render it very hard to exclude proof under this guarantee; which is, that after the contingency *has* happened, it becomes an actual debt due by the person who guarantees. It would have been much better, if the words of this section of the act of parliament had followed the certificate in *Ex parte Adney* (a); where the judges certified that the transaction was an *engagement*, and that it rested on a *contingency*, whether this *engagement* would ever become a *debt* or not. I cannot entertain the slightest doubt but that the petitioner is entitled to prove, in the case now before the Court.

(a) Cowp. 460.



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Ex parte JOSE VENTURA DE AGUIERRE SOLARTE, THOMAS ABELL, and ANSELMO DE ARROYAVE, Assignees of JOAQUIN RUEZ DE ALZEDO.—In the matter of **LIONEL KNOWLES, LIONEL KNOWLES the younger, and STEPHEN HARTLEY KNOWLES.**

Southampton
Buildings,
June 20.

THIS petition stated, that previous to the month of November 1825, *Alzedo* carried on business as a Spanish merchant in London, and the *Knowles'* carried on the business of woollen manufacturers in Yorkshire. For several years before his bankruptcy *Alzedo* was in the habit of discounting bills for the *Knowles'*, they drawing such bills on *Dyer* and *Swayne*, woollaplers, in London. This mode of dealing was afterwards changed; and the course was, that the *Knowles'* sent to *Alzedo* bills drawn on *Dyer* and *Swayne*, and then drew upon *Alzedo* for the precise amount, and afterwards discounted *Alzedo's* acceptances with their own bankers; *Alzedo* receiving the amount of the bills drawn by the *Knowles'* on *Dyer* and *Swayne*, when at maturity, and paying the amount of his own to the holders of them when due. On the 25th November 1825 *Alzedo* became bankrupt; on the 3d December 1825 the *Knowles'* were also declared bankrupts; and on the 13th December 1825 *Dyer* and *Swayne* became bankrupts. At the time of the bankruptcy of the *Knowles'*, *Alzedo* held three bills of exchange, which he had received under the first mode of dealing, which were drawn by the *Knowles'* on *Dyer* and *Swayne*; namely,

One dated 12th December 1822, for 500*l.*, payable at two months. Another dated 13th August 1825, for having never negotiated the five bills sent him by *K. & Co.*:—*Held*, that his assignees could not prove them under *K. & Co.'s* commission.

A. discounts for *K. & Co.*, who afterwards become bankrupt, three bills drawn by *K. & Co.* on *D. & S.*; one of the bills becomes due before the bankruptcy, and the two others afterwards; none of them are paid by the acceptors, and *A.* gives no notice to *K. & Co.* of their dishonour:—*Held*, that *A.* could not prove the first bill, but might prove the two others.

K. & Co. also sent to *A.* five other bills drawn by them on *D. & S.*, and received from him in return his acceptances for the precise amount, which they discounted with their own bankers, but none of which being paid by *A.* (who became bankrupt himself before they fell due), they were proved by the holders under *K. & Co.'s* commission, *A.*

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275*l.* 4*s.*, payable at four months. And the third dated 5th September 1825, for 1000*l.*, payable three months after date. All of which he had discounted for the *Knowles'*.

Alzedo also held five other bills drawn by the *Knowles'* on *Dyer* and *Swayne*, payable respectively three months after date; viz. One for 898*l.* 14*s.*, dated 1st September 1825. Another for 690*l.* 4*s.*, dated 4th October 1825. Another for 293*l.*, dated 17th October 1825. Another for 998*l.* 4*s.*, dated 25th October 1825. And another for 896*l.* 17*s.*, dated 8th November 1825. The consideration for which was five other bills, accepted by *Alzedo* for the *Knowles'*, under the second mode of dealing; which last-mentioned bills had been proved under the commission against *Alzedo*, and a dividend of 10*s.* 10*d.* paid on them.

The petition prayed that the petitioners might be permitted to prove the amount of all the eight bills against the *Knowles'* estate, after deducting therefrom 86*l.* 4*s.* 3*d.* due from *Alzedo* to the *Knowles'*.

The affidavits stated that the bill for 500*l.* was not presented for payment to *Dyer* and *Swayne*, and that no notice of its dishonour was ever given to the *Knowles'*; and that if it had been so presented, the *Knowles'* had, at the time it became due, ample funds of *Dyer* and *Swayne's* in their hands to take it up. The bills for 278*l.* 5*s.* and 1000*l.* became due after the bankruptcy of the *Knowles'*. The other five bills drawn by the *Knowles'* and accepted by *Alzedo*, had been proved by the holders under *Knowles'* commission, and a dividend of 5*s.* had been paid on them.

Mr. *Montagu* and Mr. *Swanston* for the petitioners.

If any party on a bill is compelled to pay it, on account of the failure of the acceptor, it may be proved under the commission against the acceptor, although it was not paid until after the commission issued. This doctrine, upon which the Court of King's Bench were divided in *Cowley v. Dunlop* (a), was afterwards recognised in *Buckler v. Buttivant* (b), and subsequent cases. This, however, is not a case of mere accommodation paper, but is one upon cross-bills. We contend, that the bills given by *Alzedo* form a good consideration for those in *Alzedo's* hands, and entitle his assignees to prove for their amount. *Ex parte Metcalfe* (c). [Sir G. Rose. How can you prove these bills, without showing that you have paid, or are in a situation to pay, those which you gave as a consideration for them? (d) It is quite clear, that if an action at law were brought to recover payment of them, a Court of Equity would restrain the parties from proceeding in it, on evidence of their inability to pay the latter bills given by them.] A Court of Equity would only restrain the recovery of a greater amount than what the opposite party were in a situation to pay. Besides, if the right to prove is denied to the petitioners, and the *Knowles'* obtain their certificate, the petitioners' rights are for ever barred by it, and they are without remedy. The proof of a debt, which must at all events be due, is not to be rejected because there is a question to be tried between the bankrupt's estate and the

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(a) 7 T. R. 565.

(b) 3 East, 72.

(c) 11 Ves. 404.

(d) See *Serratt v. Austin*, 4 Taunt. 201, and the cases cited in argument, *ibid.* 204.

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creditor; although it may be proper, that no dividend should be paid on the proof until the question is determined. *Ex parte Ackroyd* (a).

The whole question here is, not the admission of proof, but the amount of the dividend to be received. A Court of Equity does not nullify the debt, but merely guards against a legal right from operating unjustly, by the receipt of too large a dividend. *Ex parte Claricarde* (b), *Ex parte Curtis*, *Ex parte Lee*, *Ex parte Browne* (c). If the bills in question had been negotiated, then no doubt could have been raised against the right to prove.

The respondents set up a pretence of an agreement not to prove; we deny the existence of such an agreement; but even if it had been made, this Court would not allow it to stand, it being quite inconsistent with the duties of assignees (who are mere trustees) to be parties to any such agreement. Let us suppose that *Alzedo* accepts a bill of *Knowles*, in consideration of a cross-bill drawn by *Knowles* and accepted by *Dyer*; here, it must be admitted, there would be a reciprocal valuable consideration, unless the whole is to be considered a *nudum pactum*. In this case, also, the parties are in possession of reciprocal negotiable securities, and if they had remained solvent, there can be no doubt as to their mutual liability. Does then insolvency alter the case? It is stated, that *Alzedo*, by having neglected to prove, lost the benefit he might have had. But the estate of *Knowles* received the full negotiable value, and if *Alzedo* is deprived of his reciprocal right of proof, that value will be clear gain to *Knowles*' estate.

(a) 1 G. & J. 391.

(b) C. B. L. 172.

(c) *Ibid.* 174; but see *Re Bonner and Palmore*, *ibid.*

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between the two estates no proof could be made, in respect of the bad paper, or the excess of damage eventually sustained on that account. *Ex parte Walker* (a).

Mr. Montagu, in reply. The case of *Ex parte Walker* is a case so little to be understood from the report of it, that I take it to be no authority. And as to the case of *Ex parte Earle*, it has been held in a much more recent case, that where a party was a creditor of the bankrupt on a cash balance, and was under acceptances for the bankrupt's accommodation, which were not paid at the bankruptcy, and having received from the bankrupt bills of exchange and a promissory note to a larger amount than the cash balance, which were negotiated by the creditor, on the principle of excluding the dishonoured paper on both sides, he was not allowed to prove the cash balance; *Ex parte Read* (b). As to the want of notice of the dishonour of the 500*l.* bill, this is the first time that that objection is started; it was never taken before the Commissioner. There can be no doubt, that this debt is capable of being barred by the certificate. The proper course to be taken is, to restrain the receipt of the dividends, until the estate of *Alzedo* has paid dividends on his acceptances equal in amount to what it may be entitled to receive on the acceptances of the *Knowles*'.

ERSKINE, C. J.—The eight bills in this case stand in three different situations. The first three are bills actually discounted by *Alzedo*, and the five others are

(a) 4 Vesey, 373.

(b) 1 G. & J. 224.

merely received in exchange for cross-acceptances of *Alzedo*.

Of the first three, that for 500*l.* stands apart from the two others. Although it was discounted by *Alzedo*, yet it was never presented to *Dyer* and *Swayne* for payment, and consequently no notice of the dishonour of it was given by *Alzedo* to the Messrs. *Knowles*. This, I think, is a fatal objection to its being proved.

With regard to the other two, although no notice of the dishonour was given, yet, as they fell due after the bankruptcy of Messrs. *Knowles*, no notice was requisite, and therefore the proof as to them should be admitted.

As to the five other bills, I am of opinion that the proof ought not to be admitted. If *Alzedo* had negotiated them, there is no doubt but that the holder might have proved them, if he had given a good consideration for them; but as they are still in *Alzedo's* hands, the question is, what consideration has he given?—the answer is, counter-acceptances, which are unpaid, and for which he is not in a situation to enable him to give any indemnity. This is in fact no consideration, and therefore I think the proof for the five bills must be rejected.

Sir J. Cross.—The whole question is, what consideration *Alzedo* has given for the last five bills;—none has been given; they therefore create no debt, without which a party cannot prove. The amount of the dividends paid under each estate does not, in my opinion, alter the case. I think, therefore, the proof of them must be rejected; and as to the three others, I entirely concur in the judgment of his Honour the Chief Judge.

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Sir G. ROSE.—I think the case of *Sarrett v. Austin* (a) decisive on this point, and that the proof of the five bills must be rejected. Suppose that *Alzedo* had brought an action for the recovery of the amount of them, it is admitted that an injunction might be obtained to restrain it. On coming to dissolve that injunction, it is clear that the payment of the dividend of 10s. 10d. could not help him ; he must pay, or give indemnity for the whole 20s. in the pound, before he could dissolve the injunction. From the circumstance of his bankruptcy, it is evident he could give no indemnity. Another test is, would these five bills form a good petitioning creditor's debt? It is clear they could not, as no consideration was in fact given for them. And if they would not constitute a good petitioning creditor's debt, so neither are they proveable under a commission. As to the three other bills, I concur in the judgment already given.

The proof was therefore admitted of the 278l. and 1000l. bills, and the petition dismissed as to the others. Costs of each party to be paid out of their respective estates:

(a) 4 Taunt. 201.



Ex parte WIGGINS.—In the matter of **NICHOLLS**
and another.

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—
Southampton
Buildings,
June 23.

THE petitioner in this case had let a cart-horse on hire to the bankrupts, who were ironmongers. They had retained it in their possession for twelve months previous to their bankruptcy, when the assignees laid claim to it as being in the reputed ownership of the bankrupts, and refused to give it up; and the petitioner now prayed that they might be directed to restore it to him.

W., a horse-contractor, lets out a cart-horse on hire to N. & Co., who have it in their possession more than a twelve-month, and then become bankrupt:—*Held*, that it does not pass to their assignees, as being in their reputed ownership.

The Court having directed a *vivâ voce* examination of witnesses, to show more clearly the nature of the bankrupts' possession of the horse at the time of their bankruptcy,

On a petition by the owner for the re-delivery of the horse, and a *vivâ voce* examination of witnesses, the bankrupt is an incompetent witness.

Mr. Montagu, for the petitioner, called two witnesses, who proved that the petitioner was a horse-contractor, who let out cart-horses to various persons in trade, particularly to those engaged in the coal and iron trade; that they were frequently let by the year, or the day, but most commonly by the month; and that the horse in question was one which the petitioner had thus let on hire to the bankrupts.

Mr. Swanston, for the assignees, after calling a witness whose evidence did not alter the above facts, proposed to call the bankrupt, but

Mr. Montagu objecting to his competency,

The COURT said that the present proceeding was in the nature of an issue at law to try a question of pro-

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—
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perty, and that the examination must be subject to the usual rules of evidence, which render the bankrupt an incompetent witness to increase the fund.

Mr. *Swanston* then contended, that the case was one of reputed ownership. The horse, having been so long in the possession of the bankrupts, must be considered as in their order and disposition at the time of their bankruptcy, within the terms of the 72d section of the 6 Geo. 4. c. 16.; unless some special custom of trade had been proved to vary the nature of the transaction. The words of that section are in the alternative, "in his possession, order, or disposition," which was not so in the former act(a). The case of *Bryson v. Wylie*(b) decided, that a dyer's plant let to a bankrupt was in his possession as reputed owner, and this case falls within the same principle. The bankrupts here were in possession of the horse for more than a twelvemonth, and the usual period for which the petitioner let out horses was only one month.

ERSKINE, C. J.—Inasmuch as there has been no proof in this case, that the horse was ever the property of the bankrupts, slight circumstances will be sufficient to show that it did not really belong to him. And I think the presumption of property in the bankrupt is satisfactorily rebutted by the evidence that has been adduced.

Sir J. CROSS.—No one witness has been called on the part of the assignees, to say, that he ever gave

(a) The 21 Jac. 1. c. 19. s. 11.

(b) 1 Bos. & P. 83, note (c).

the bankrupts credit, as being the owners of the horse.

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Ordered as prayed.

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Ex parte SAMUEL SMITH and others.—In the matter of
MANNINGS and ANDERDON.

Southampton
Buildings,
June 28.

THIS was a petition of Messrs. *Smith, Payne, and Smiths*, the bankers, praying to be declared the equitable mortgagees of certain plantations and slaves in the Island of St. Christopher. The petitioners had charges on two distinct estates in which the bankrupts were interested, one of which was called the “Cunyngham Estate,” and the other the “Estridge Estate;” and it was only with respect to the latter estate that the petition was resisted. It appeared that by indentures of the 9th and 10th April 1829, made between *William Manning* and *Thomas Pitt*, trustees under the will of *John Estridge* of the first part, the said *William Manning*, and *Frederick Manning*, and *John Luricount Anderdon* (the above-named bankrupts) of the second part, *Charles Franks* and *James Whatman Bosanquet* of the third part, and *Adam Stevens* and *Duncan Robertson* of the fourth part, certain plantations and tracts of land in the Island of St. Christopher, described as late the estate of the said *John Estridge*, and all the negro and other slaves upon or belonging to the same, and the issue, offspring, and increase of the females of the said slaves, and all cattle, horses, mules, plantation-tools and implements, and all other live and dead stock and effects upon or belonging to the said plantations and estates, were assured unto and to the use of the said

M. & Co. deposit with *S. & Co.* the mortgage deeds of certain colonial property, for securing a floating balance due from *M. & Co.* to *S. & Co.*, and afterwards execute an assignment of the mortgage debt, “in addition to the securities then already held by *S. & Co.*,” but without making any actual assignment of the mortgage itself, or the mortgaged property:—
Held, that *S. & Co.* continued nevertheless the equitable mortgagees of the mortgaged property.

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Charles Franks and James Whatman Bosanquet, their heirs, executors, administrators, and assigns (subject as in the said indenture is mentioned), upon trust nevertheless for the said bankrupts, their executors, administrators, or assigns, or other the person or persons for the time being constituting the firm then described as the firm of *Munnings and Anderdon*, by way of mortgage for securing the sum of 11,500*l.*, then and still due and owing to the bankrupts from the estate of the said *John Estridge*, together with interest thereon at 6*l.* per cent.

Upon the execution of this mortgage, the bankrupts deposited it with the petitioners, as an additional security for any balance which might from time to time be due to them from the bankrupts; and the petitioners caused notice of their claim to be given on the 4th June 1830 to the trustees named in the mortgage, who acknowledged the same in a letter addressed to the petitioners, undertaking to hold the same in trust for the petitioners.

By indentures of lease and release of the 28th and 29th May 1830, the release made between the bankrupts of the first part, the petitioners of the second part, and *J. W. Freshfield* and *J. Beadnell* of the third part,—after reciting that the bankrupts stood indebted to the petitioners in divers sums of money, and had requested the petitioners to advance them further sums; which the petitioners had agreed to do, on having the repayment thereof, with interest, partly secured (amongst other things) by an assignment or transfer of the said debt of 11,500*l.* so secured to the bankrupts by the indentures of the 9th and 10th April 1829, *in addition to the securities then already held* by the petitioners,—it was witnessed, that in pursuance and further perform-

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ance of the said agreement, the bankrupts, at the request and by the direction of the petitioners, did grant, bargain, sell, assign, and confirm unto the said *J. W. Freshfield* and *J. Beadnell*, their executors, administrators, and assigns (amongst other things), the said debt of 11,500*l.* secured by the indentures of the 9th and 10th April 1829, and then due and owing to the bankrupts, and the interest due and to become due for the same, and all powers and remedies for recovering and enforcing the payment of the said debt. To hold the same unto the said *J. W. Freshfield* and *J. Beadnell*, their executors, administrators, and assigns, in trust for the petitioners; but subject to redemption, if the bankrupts or the other person or persons for the time being constituting their firm should, within three months after notice in writing requiring payment, pay all the monies then due from that firm to the petitioners, for or in respect of any sums already advanced, or to be thereafter advanced, by the petitioners, together with interest at 4*l.* per cent.

By another indenture bearing date the 10th September 1830, between the bankrupts of the first part, the petitioners of the second part, and *J. W. Freshfield* and *J. Beadnell* of the third part, the bankrupts covenanted with the petitioners, that the interest upon the sums of money secured by the said indentures of the 28th and 29th May 1830 should be calculated thenceforth at the rate of 5*l.* per cent.

The petition then went on to state, that on the 2d August 1831 there was due from the bankrupts to the petitioners a considerable sum of money, and that there still remained due the sum of 54,000*l.*; and that the petitioners on that day gave notice in writing to the bank-

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rupts to pay to them, within three calendar months, all the monies that might be then due, with interest at 6l. per cent.

The commission issued against the bankrupts on the 5th September 1831, and *Nevile Reid, John Dison, and Richard Wrangham*, were chosen assignees. No assignment had ever been made to the petitioners of the mortgage of the 9th and 10th April 1829; and the question was, whether the petitioners continued equitable mortgagees of the property thereby conveyed.

The petitioners prayed, that they might be declared equitable mortgagees of the mortgage of the said plantations, estate, slaves, and premises, and the debts thereby secured: That it might be referred to the Commissioner to take an account of the principal, interest, and costs due upon such equitable mortgage, and of the rents and profits of the said plantations and premises (if any) received by the petitioners, or by any other person by their order, or for their use: That the Commissioner might cause due notice to be given when and where the said mortgage debt, and the right and interest of the petitioners, were to be sold; and that such sale might be made accordingly: That the petitioners might bid at the sale: That the monies arising from the sale might be applied, first, in payment of the expenses of the sale, and of the costs of the petitioners and the assignees of this application, to be taxed by the Commissioner as between solicitor and client,—and then in payment and satisfaction of what should be found to be due to the petitioners for principal, interest, and costs,—and that the surplus (if any) might be paid to the assignees; and that in case the monies to arise from the sale should be insufficient to satisfy what

should be so found due, then that the petitioners might be admitted to prove for the deficiency.

In support of this petition, Mr. *Freshfield*, the solicitor of the petitioners, made an affidavit that he was employed by them to prepare the indentures of mortgage of the 9th and 10th April 1829; that the bankrupts, at his request, procured the same to be executed by the mortgagors, and then delivered them to the deponent on behalf of the petitioners; that he thereupon requested the bankrupts to send them to St. Kitt's for registration, and that he received them back from the bankrupts early in 1830; whereupon he prepared the indentures of the 28th and 29th May 1830. And the deponent stated, that he prepared the indentures of mortgage of the 9th and 10th April 1829, by way of additional security for the debt due to the petitioners; that he placed them in the hands of the bankrupts for the sole purpose of procuring them to be registered, and that he continued to hold them as the solicitor of the petitioners.

In answer to the facts above stated, it was sworn, that the estates of the late *John Estridge*, in the island of St. Kitt's, had been many years under the management of one *G. W. Parson*, and that he and *Elizabeth Estridge*, one of the parties interested in the estates, resided upon them. That the bankrupts had for many years received the consignments of the produce of the estates, and applied the net proceeds towards the discharge of the money owing to them from these estates; and that at the time of their bankruptcy there was due to them 10,916*l.* 13*s.* 10*d.* That no notice was given of any assignment of that debt in favour of the petitioners, either to *Elizabeth Estridge* and *G. W. Parson*,

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or to any other person in the island of St. Kitt's; and that the bankrupts continued to receive the consignments of the produce of the estates, after the above-mentioned assignment and securities had been granted to the petitioners, in the same manner as before. That the indentures of the 9th and 10th April 1829 were recorded at St. Kitt's; and when they were sent there for that purpose, Mr. *W. Manning* wrote to *Elisabeth Estridge* an explanatory letter,—saying, that as the bankrupts had not a sufficient mortgage for their debt, they had applied to Mr. *Pitt* and himself to execute a mortgage to them, which they had accordingly done; but that no other assignment or transfer executed by the bankrupts in favour of the petitioners was so recorded, nor any notice given of it; nor had any party connected with the *Estridge* estates any knowledge of any such assignment or transfer, or that the debt owing by those estates was not really and *bonâ fide* the property of the bankrupts at the time of their bankruptcy.

Mr. *Kindersley* and Mr. *Turner*, for the petitioners, contended, that it was quite clear, from the affidavit of Mr. *Freshfield*, that the petitioners were the equitable mortgagees of all the estate and interest, which had been assigned in trust for the bankrupts by the indentures of the 9th and 10th April 1829; that those indentures were duly deposited by the bankrupts with Mr. *Freshfield*, as the solicitor of the petitioners, to secure the advances of money made by the petitioners to the bankrupts, as mentioned in the subsequent mortgage deed of the 29th May 1830; that they were merely delivered to the bankrupts for the purpose of registering them at St. Kitt's, according to the laws of that

colony; and that they were afterwards received back from the bankrupts by Mr. *Freshfield*, in his same character of solicitor for the petitioners, in order to prepare the mortgage deeds of the 28th and 29th May 1830.

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Mr. *Richards*, for the assignees. The point I have to contend is, that the deed of 1830 merely assigned to the petitioners the *debt* owing to the bankrupts from the estate of *John Estridge*, and did not operate in any way upon the *security* for that debt. [Sir *G. Rose*. There is no doubt about the principle, that if there is an assignment of a debt specified in a security, and the assignment refers in terms to the security, that carries the security also.] But wherever there is an assignment of a debt, the assignment is not good, without notice to the debtor. The deed of 1830 was only an assignment of the debt; and as there was no notice of this assignment given to the trustees under the will of *John Estridge*, the debt passed to the assignees of *Mannings* and *Anderdon*. It seems also very questionable, when the deeds of 1829 charging the real property were put into the hands of Mr. *Freshfield*, on behalf of the petitioners, whether the deposit was intended as a security upon the land, or a security upon the debt. If it was intended as a security upon the land, it is very strange that in the deed of 1830, which was prepared after the deeds of 1829 came back from St. Kitt's, where they had been sent for the purpose of registration, there is no notice whatever taken of the land, but the security is wholly confined to the debt. The deed of 1830 recites the indentures of lease and release of the 9th and 10th April 1829, and that the bankrupts were indebted to the petitioners in large

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sums of money, and had requested them to advance further sums, which the petitioners had agreed to do, on having an assignment or transfer “ of the *said debt* of 11,500*l.* so secured to them by the indentures of the 9th and 10th April 1829;” and then by the granting part of the deed nothing more is assigned to the trustees for the petitioners than “ the said debt of 11,500*l.*, and the interest due, and to become due, for the same, and all powers and remedies for recovering and enforcing the payment of the said debt.” In no part of this deed is there any assignment of the mortgage deeds of 1829; it merely makes over the debt, and not the security by which the debt was secured. [Sir G. Rose. There is quite sufficient in the reciting part of the deed to show what was the intention of the parties.] There is, however, no mention whatever in the recitals that the deeds of 1829 were deposited with the petitioners, or with any person on their behalf. [Sir J. Cross. But there is the actual fact of the deposit of these deeds with Mr. Freshfield, on behalf of the petitioners. Sir A. Pell. In the recitals, too, which notice the deeds of 1829, it is expressly said, that the petitioners had stipulated for an assignment or transfer of the debt of 11,500*l.* so secured by the indentures of the 9th and 10th April 1829, “ in addition to the securities *then already held*” by the petitioners. There can be no doubt, that it was the intention of the parties, that the petitioner should have as full a security as could be given.] In the recitals of the deed of 1830, there is no express mention of the deed of 1829, except in reference to the debt of 11,500*l.* It seems to make a distinction between the *debt*, and the *lands*. If the *debt* only was made over, then no interest in the *lands*

could pass to the petitioners. The deed of 1829 was deposited, merely, with the object of better securing the debt owing by the bankrupts to the petitioners. And the subsequent deed of 1830, I contend, conveyed no estate or interest in the *lands*, but was confined in its operation to the *debt* alone.

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ERSKINE, C. J.—There is the fact here of the deeds of 1829 being deposited with the solicitor of the petitioners; and it appears to me, that the only question in this case is, what was the object of that deposit? Now, the affidavit of Mr. *Freshfield* leaves no doubt of the purpose for which they were deposited. But it is contended, that inasmuch as the subsequent deed of 1830 was prepared, without any mention being made in it of the deposit of the deeds of 1829,—and as nothing was assigned by that deed, but the *debt* of 11,500*l.* due from the Estridge estate to the bankrupts,—the deeds of 1829, therefore, could not be considered as giving any equitable interest to the petitioners in the lands thereby mortgaged to the bankrupts. But the deeds of 1829 were put into Mr. *Freshfield's* hands, as the solicitor of the petitioners, after he had prepared them, by way of *additional security* for the debt due to the petitioners. The recitals in the deed of 1830 are certainly somewhat obscure, but it is very clear what was the intention of the parties.

Sir A. PELL.—The recital in the deed of 1830 states, that the assignment of the debt of 11,500*l.* was to be “in addition to the securities then already held” by the petitioners. The petitioners, therefore, would be worse off than they were before the debt was assigned

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to them, if the deeds of 1829 were not to be included among those securities, because they were not particularly specified as such in the subsequent assignment.

Sir J. CROSS.—There was an *intention*, certainly; to add the assignment of the debt to the other securities held by the petitioners.

Sir G. ROSE concurred. — You cannot take the common order, but merely a declaration that all such interest, as the trustees for the bankrupts had conveyed to them by the mortgage of 1829 in trust for the bankrupts, should be sold; the rest of the prayer of the petition will be of course.

Ordered, that the petitioners should be declared to be equitable mortgagees, as against the bankrupts; with a reference to the Commissioner to take the account as prayed by the petition.



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Ex parte JAMES ASHWELL.—In the matter of **HENRY CAZENOVE and JAMES CAZENOVE.**

Southampton
Buildings,
June 30.

THIS was a petition of a creditor to prove a debt under the following circumstances, as stated in the petition.

The bankrupts had carried on the trade of merchants in partnership with *John Cazenove*, under the firm of *James Cazenove & Co.*, and the fiat was issued on the 31st January 1832. In October 1827, the bankrupts, together with their partner *John Cazenove*, in consideration of the petitioner executing an order for a sugar mill which he had received from a Mr. *Duolmard* of the Isle of France, gave the petitioner a guarantee for the payment of the price of it, which order and guarantee were in the terms following:

“ London, 4th October 1827.

Messrs. Ashwell & Co.

I hereby order you to make and ship for me as early as possible a sugar mill, according to the particulars in the annexed papers, folios 3, 4, 5, and I hereby direct Messrs. *James Cazenove & Co.* to pay you the sum of 350*l.*, on your producing to them a bill of lading of the same; also a further sum of 300*l.*, on your producing to them a certificate duly attested and signed by your engineer in the Isle of France, that he has properly erected the said sugar mill, and that it has well and sufficiently worked the period of ten days. Also, if through any misfortune to the engineer, or otherwise, this certificate cannot be produced, I hereby authorize Messrs. *James Cazenove & Co.* to pay to you the said sum of 300*l.*, on the production of a similar certificate from any resident engineer. As witness my hand,

W. F. Duolmard.”

C. & Co., before their bankruptcy, guarantee to *A.* the payment of 300*l.* for the erection by him of a sugar mill for *D.*, on the production of a certificate by an engineer that the mill was erected according to the terms of a certain specification. *A.* produces a certificate of the erection of the mill, stating, however, a deviation from the original plan, with the consent of *D.*; upon which *C. & Co.*, without making any objection to such deviation, inform *A.* it was not in their power to pay the money:—*Held*, that *A.* might prove the 300*l.* under the fiat issued against *C. & Co.*

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“ In consideration of Messrs. *Ashwell & Co.* executing this order for Mr. *Duolmard*, we hereby undertake to make the payments directed by him, on the terms and at the periods he has named. Witness our hands this 5th day of October 1827.

“ *James Cazenove & Co.*”

This order was duly executed by the petitioner, from drawings seen and approved of by Mr. *Duolmard* previous to the mill being made, and the petitioner was duly paid all the money secured to him except the last-mentioned sum of 300*l.* After the erection of the sugar mill in the Isle of France, the petitioner procured from the engineer employed in the erection of it, the following certificate:

“ I hereby certify that the windmill, shipped by Messrs. *Ashwell & Co.* of London, on board the *Ceylon*, Captain *Davidson*, has been erected by me, and been at work, to the satisfaction of Mr. *H. F. Duolmard*, on whose estate it has been set up, since the latter part of November last.

“ In consequence of its being found that, by erecting the cattle apparatus shipped along with the above mill, and adapted to it, it would have been impracticable to pass the canes when the cattle were at work, the drawings not having made provision for that circumstance, it was by Mr. *Duolmard*’s desire, that the cattle mill has not been erected along with the above. Mr. *Duolmard* having since made the latter circumstance a pretext for not delivering Messrs. *Pierson* and *Marion* a certificate of the due erection of the mill, I do hereby further declare, that Mr. *Duolmard* stated to me himself, that if the cattle mill had even been erected, he would never have made use of it, as it would have ne-

cessitated his incurring a heavy additional expense for cattle ; and that as his estate was a small one, he should, in the interval of the mill not working for want of wind, be enabled to employ his blacks in fetching canes for the windmill when at work again.

“ Port Louis, Mauritius, 30th Jan. 1830.

“ *Thomas Stanning.*”

In May 1830 the petitioner sent a copy of this certificate to the bankrupts and their said partner, and made application for the payment of the sum of 300*l.* pursuant to the terms of the above order. In answer to which application the bankrupts wrote to the petitioner as follows :—

“ Messrs. *James Cazenove & Co.* present their compliments to Messrs. *Ashwell & Co.*, and beg to observe, that the certificate of the erection of Mr. *Duolmard's* mill by *Thomas Stanning* is not duly attested, as required by the contract. It contains moreover a clause respecting the non-erection of the cattle mill, which would require a particular notarial attestation, that the unfounded objections alone of Mr. *Duolmard* prevented its being completed.

“ Broad Street Buildings, 29th May 1830.”

In consequence of this letter the petitioner sent out again to the Isle of France, and procured from the engineer another certificate of the same purport, authenticated and attested by a notary public, and accompanied by an affidavit of the engineer, verifying the truth of the same; copies of which documents the petitioner, in June 1831, transmitted to the bankrupts and their said partner, and again applied for payment of the 300*l.* ; but they informed the petitioner, that it

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would not be in their power, in their then circumstances, to make the payment.

After the issuing of the fiat against the bankrupts, the petitioner tendered to the Commissioner a proof for the debt of 300*l.*; but the Commissioner, although he allowed a claim to be entered upon the proceedings, rejected the proof, upon the ground that the certificate produced by the petitioner was not strictly within the terms of the order on which the guarantee was given; it appearing that there had been a variation in the erection of the sugar mill from the particulars thereof referred to in the order for the same, notwithstanding such variation was made at the express desire of Mr. *Duolmard*.

The petitioner offered to produce evidence to the Commissioner, to prove that the mill had been made conformably to the particulars annexed to the order; that a drawing of it had been previously seen and approved of by Mr. *Duolmard*; and that the drawings and the work corresponded; but the Commissioner decided, that such evidence would not alter his view of the case.

The petitioner therefore prayed that he might be at liberty to prove his debt of 300*l.*, and that the costs of the petition might be paid out of the bankrupt's estate.

Mr. *Montagu* appeared in support of the petition.

Mr. *Lovat* for the assignees.—There were two things necessary to be done by the petitioner, before he could charge the bankrupts with the sum of 300*l.* by virtue of the guarantee. *First*, The mill was to be constructed pursuant to the terms of the order: *Secondly*,

it was to be well and sufficiently worked by wind or cattle for the period of ten days before the giving of the certificate by the engineer. I contend, that the mill was so constructed as to be incapable of working, according to the terms of the specification.

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ERSKINE, C. J.—As I understand the objection taken to this proof, the assignees of Messrs. *Cazenove* now dispute the substantial insufficiency of the certificate given by the engineer. Messrs. *Cazenove*, however, did not make this objection when they had it before them, but said, merely, that it was inconvenient in their then circumstances to pay the 300/. I think, therefore, that as they did not take the objection in the first instance, their assignees cannot do so now.

Sir A. PELL concurred.

Sir J. CROSS.—After Mr. *Duolmard* had used the mill, and made no objection to it, I think it cannot now be objected, that the mill was not erected according to the strict terms of the specification. At any rate, Messrs. *Cazenove* have no right to make the objection, if the petitioner produced to them the requisite certificate: it was only competent to Mr. *Duolmard* to make such objection.

Sir G. ROSE.—If the bankrupts had sworn, that they did not mean to compromise their right to have a certificate of the mill having been erected, pursuant to the strict terms of the specification, when they informed the petitioner that it was not in their power to pay the 300/., then perhaps you might have had a case; but;

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under the circumstances stated to the Court, there can be no objection to this proof.

The order was therefore made according to the prayer of the petition.

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Ex parte SHADBOLT.—In the matter of Fox.

Where an order made in bankruptcy reserves further directions and costs, a subsequent application to the Court as to the costs merely, may be entertained by motion; but if it is by way of further directions, it must be by petition.

The solicitor for the respondents ought to have notice of such an application, as well as the respondents themselves.

THIS was a petition which had been heard by the Vice-Chancellor(a) previous to the operation of the Bankruptcy Court Act, when an order was made by his Honour, reserving all further directions and costs.

Mr. *Montagu* now moved, that the petition might be transferred to this Court, and heard on the question of costs only.

Mr. *Bligh*, for the respondents, objected, that their solicitor was not served with notice of this application. The petition having been so long pending in the Court of Chancery, the petitioner's solicitor was well aware, that the solicitor for the respondents ought to have been served, and not the respondents themselves; who were a parcel of ignorant persons, and upon whom service alone therefore was nothing less than a fraudulent service.

Mr. *Montagu*, *contrà*. The parties themselves were the right persons to serve in bankruptcy. The common practice is, to apply for an order that service on

(a) See 1 Mont. 89.

the solicitor may be deemed good service. This shows, therefore, that the usual course is to serve the parties.

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The COURT said, that in bankruptcy there was no particular officer of the Court; but as the solicitor had not been served, it gave the respondents a title to the indulgence of the Court.

Mr. *Bligh* then said, that if the Court thought it had jurisdiction to entertain this application, he should wish for an opportunity of filing affidavits as to the merits. But he contended, that the Court had no jurisdiction to make any order in this matter; 1st, because it was standing in the Vice-Chancellor's paper at the time this Court was constituted; 2dly, because the application should have been by petition, and not by motion. In support of the first objection the case of *Ex parte Benson*(a) was cited, in which the Vice-Chancellor says, that "in cases where the Vice-Chancellor has made an order, the order is irreversible, except by the Lord Chancellor's authority."

With respect to the second objection, that this proceeding ought to have been by petition, and not by motion, the case of *Ex parte Lowe* (b) is applicable. That was a petition, like this, removed into this Court; and though the Court thought at first they had jurisdiction to hear it upon motion, yet they decided afterwards that they could not hear it effectually, except upon petition.

By the order of the Vice-Chancellor, also, made in Dec. 1830, all further directions and costs were to be reserved; and all matters coming before the Court by way of further directions, ought to be by petition.

(a) 1 Deac. & C. 324.

(b) 1 Deac. & C. 79.

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Mr. *Montagu*.—The order (*a*) of the Court of Review is, that all petitions transferred here may be brought on by way of motion.

ERSKINE, C. J.—When this Court said, that matters might be brought on here by way of *motion*, it was intended to be on the condition that the parties consented. According to the Act of Parliament (*b*), which gives this Court jurisdiction, matters may certainly be brought on by way of petition, motion, or special case, according to the rules and regulations to be established as hereinafter provided; which a subsequent section (*c*) of the act empowers the judges of this Court, from time to time to make for regulating its practice. But, it appears that the former practice in bankruptcy has been to proceed by petition, and not by motion, when matters came before the Court by way of further directions; and this Court has not altered that practice. From the terms, however, of this motion, this is not a matter which comes before us by way of further directions, but merely on a question of costs reserved by the Vice-Chancellor. I understand it was the practice to bring on questions of costs reserved, by way of motion; and if that be so, this proceeding cannot of course be now objected to, on the ground of its being brought before the Court by way of motion.

Sir A. PELL.—I should have been ill at ease, if we had thought ourselves so far bound by the former practice in bankruptcy, as to refuse this application; which being, however, an application confined to that part of the

(*a*) 16 January 1832. See vol. i. p. 31.

(*b*) 1 & 2 W. 4. c. 56. s. 3.

(*c*) Section 11.

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Vice-Chancellor's Order relating to the *costs* only, and not for *further directions*, it seems might have been heretofore made by motion. But I go beyond that. I say, we shall not fulfil the intent of the legislature in constituting this Court, if we do not entertain litigant questions on motion, as often as we conveniently can. For I have seen enough of the former practice in bankruptcy, since I have had the honour of a seat in this Court, to know that the proceeding by petition is, and has been, in the words of the statute, productive of no little "expense, delay and uncertainty."

Sir J. CROSS.—I have always understood, that in Courts of Law the universal practice is, *pendente lite*, to bring on all interlocutory proceedings by way of motion. I was surprised to hear, I confess, that the practice was different in bankruptcy, when the counsel for the respondents insisted on this objection. But as the present application is not for further directions, but merely relating to the costs, there is consequently no ground for the objection.

Sir G. ROSE.—There can be no doubt that, according to the order of this Court, petitions pending before the Lord Chancellor, or Vice-Chancellor, when this Court commenced its jurisdiction, might be transferred here by motion. But when the petition has got here, then the question is, how the application is to be made to attain the object sought, whether by petition, or by motion. The former practice in bankruptcy has always been to proceed by *petition*, when any matter came before the Court by way of *further directions*. The Court may, undoubtedly, alter the practice if they

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choose, and say this may be done by *motion*. But as Mr. *Montagu* now says, that his object in coming here is merely to apply for costs, and not to ask for further directions, there is no objection to his doing this by motion.

The case stood over, on the question of costs, to give the respondents time to file affidavits, as to the merits.

Southampton
Buildings,
June 30 ;
July 3 and 4.

Ex parte HUMPHRY MILLETT GRYLLS, and Ex parte JOHN BATTEN and others.—In the matter of THOMAS GUNDRY and JOHN GUNDRY.

A., an assignee, purchases, as trustee for *B.*, some shares which the bankrupt had in certain mines, and, after retaining them in that character a twelvemonth, repurchases them of *B.* for his own use:—*Held*, that the transaction was void, on the general principle that an assignee cannot purchase any part of the bankrupt's property, either for himself or another ; and that *A.* must be considered a trustee of the shares for the benefit of the general creditors.

THESE were two petitions in the same matter, the first excepting to, and the other for confirming, the master's report, which had been made in this bankruptcy, under the following circumstances(*a*). The bankrupts, previous to their bankruptcy, were respectively possessed of certain shares in two mines, called, *Wheal Vohr*, and *Wheal Vreah*, in the county of Cornwall. On the 20th January 1820 separate commissions were issued against them, and on the 24th January a joint commission; and the same persons, namely, *Humphry Millett Grylls* (who was an attorney and banker at Helston, and also steward and agent of the Duke of Leeds), and *Charles Read*, were chosen assignees under both commissions. On the 25th April 1820 the separate commissions were superseded, and all the

(*a*) For other facts connected with this case, see *Ex parte Badcock*, Mont. & M. 231.

On the hearing of exceptions to the master's report, those affidavits only in support of against the original petition can be read, which were used in evidence before the master.

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place on the 6th June 1820, when *Grylls* was declared to be the purchaser at the sum of 18,000*l.*, being in fact the only bidder, and having been authorized to bid by the new adventurers, in their behalf, at a meeting called for that purpose. At this meeting *Grylls* agreed to take eleven 54th shares for himself and his friends, if the sale was made in the Vice-Warden's Court. It appeared that the mines had been, ever since their relinquishment by *Grylls* and *Read*, in an improving state; and it was alleged, that the new adventurers had since the sale divided profits to the amount of 32,500*l.*, and that *Grylls* had in his possession an accumulated capital of 4,000*l.* on account thereof, and that the mines with the materials were now worth at least 100,000*l.* Of the eleven 54th shares taken by *Grylls* four were assigned to *Charles Trelawney*, and one to *John Borlase* and *James Plomer*; but *John Borlase* subsequently returned his half share, leaving *Grylls* possessed of six and a half shares. By the relinquishing afterwards of certain shares by *John Rogers*, the shares in the mines were decreased from 54th to 50th shares.

In the year 1828 a petition was presented by *William Badcock*, and other creditors of the bankrupts, to the Lord Chancellor, praying, among other things, that *Grylls* and *Read* might be removed from being assignees, and might be declared to be personally liable to the bankrupt's estate, for all loss occasioned by their relinquishment of the bankrupt's interest in the mines. This petition was finally heard on the 8th July 1829,^(a) when Lord *Lyndhurst* ordered that all further proceedings under the commission, then in prosecution, should

(a) See *Ex parte Badcock*, Mont. & M. 243.

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be stayed, and that a renewed joint commission should be issued ; that *Grylls* and *Read* should be discharged from being assignees, and that new ones should be chosen, *Grylls* and *Read* being restrained from voting in such choice ; and that as to the shares, and parts of shares, in the mines called *Wheal Vohr*, and *Wheal Vreah*, which *Grylls* took, and had continued to retain ; and also as to such shares, or parts of shares, as he took for his friends, but which they, or any of them, had declined to adopt, or had returned to him, he was to be considered a trustee for the benefit of the creditors seeking relief under the original and renewed commissions ; and if the parties should differ as to the shares or parts of shares, in respect of which he was to be considered a trustee, then it was referred to the master to inquire what shares and parts of shares had been so taken and retained by him ; and it was ordered that *Grylls* should come to an account before the master for all monies received by him, or by any other persons by his order, or for his use, in respect of such shares so taken and retained by him, or of the produce thereof ; in the taking of which account the master was to make unto him all just allowances.

In pursuance of this order, a renewed commission was duly issued against the bankrupts on the 20th August 1829, and *J. Batten*, *E. Turner*, and *J. S. Brown*, were chosen assignees under the same. On the 16th August 1831 the master made his report, which was very voluminous. After reciting at great length the previous facts of the case, the master certified that *Grylls*, as owner of six 50th and one 100th shares in the mines, had continued to receive his share of the profits up to the date of the Lord Chancellor's order ; that on the 11th September last he assigned three 50th and one

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100th shares to the new assignees, in pursuance of the Lord Chancellor's order, and that he paid them a sum of 3453*l.* 6*s.* 8*d.* on account of the profits of such shares; and that they had since received their share of the profits, in respect of such shares.

The master further certified, that the assignees had by their state of facts laid before him charged, that there were still three 50th shares in the mines, standing in the name of *Grylls*, of which he ought to be considered a trustee for the benefit of the creditors, pursuant to the Lord Chancellor's order.

The master certified, however, that in the discharge laid before him on behalf of *Grylls*, it was alleged that the mines were a losing concern when they were relinquished by *Grylls*, and that there was a prospect of their being immediately stopped, and all the workmen thrown out of employment; to avert which calamity, it was determined to form a new adventure, and divide the mines into new shares. That *Grylls* being himself a considerable landholder in the parish of Bredge, where the mines were situate, as well as in the adjoining parishes where the workmen resided, he was prevailed on to take eleven 54th shares in the proposed new adventure, for himself and his friends; of which shares four were taken for *C. Trelawney*, the lord of the mines, three for the Duke of Leeds, and one for *John Borlase* and *James Plomer*, all of whom, by themselves or their agents, had previously engaged to take the same, but that *John Borlase* having afterwards declined, *Grylls* agreed to take to his share. That in pursuance of the determination to form such new adventure, *Grylls* was deputed professionally to purchase the whole mines; and that the shares so taken by *Grylls*, and the other adventurers, had no reference whatever to the interest

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pose of them, relinquished them altogether at a loss of 635/.; and by this means the shares in the mines became 50th, instead of 54th, shares. Towards the latter end of the year 1822, however, the mines had improved; and on the 20th November in that year a dividend of profit was declared among the new adventurers, and the share of such dividend belonging to the Duke of Leeds on the said three shares amounted to the sum of 150/., which was retained by *Grylls* towards liquidating the principal and interest due on the said promissory note. That *Grylls* knowing the anxiety of the Duke of Leeds to part with his shares, proposed to become the purchaser of them, upon the terms of returning the said promissory note, and retaining the amount of the profit then received; to which proposal Mr. *Rackham*, the Duke's agent, acceded; and *Grylls* accordingly returned the note to Mr. *Rackham* and appropriated the said sum of 150/., to his own use, which transaction the Duke of Leeds afterwards fully confirmed. That *Grylls* had thus, from the 13th February 1823, become the purchaser and absolute owner of the said three shares, but that no deed or instrument was executed in the transfer of such shares. That under the circumstances above stated *Grylls* received his proportion of the profits, and divided the loss of the said mines as apparent owner of the six 50th and one 100th shares up to the 11th September 1830, being only, however, in fact owner of three 50th and one 100th shares until he purchased those from the Duke of Leeds. That the three 50th and one 100th shares, which *Grylls* relinquished to the assignees, he insisted did not wholly belong to the bankrupt's estate, but only in the proportion which the bankrupt's shares bore to the whole

mine; and that the three 50th shares then standing in *Grylls*' name were not shares, of which he ought to be considered a trustee for the creditors of the bankrupt, but were his own absolute property.

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The master then, after setting forth two affidavits of the Duke of Leeds and Lord *James Townshend*, which supported the statement made by *Grylls* in his discharge, certified, that he had considered of the several matters, and was of opinion, that the said three 50th shares were purchased by *Grylls* for the Duke of Leeds, and that such purchase was a *bonâ fide* transaction, and made by the authority and under the sanction of the Duke; who in the month of December 1830 became the proprietor, for a valuable consideration, of the said three 50th shares, and as such accountable for any loss that might be sustained upon a resale of such shares. And that in or about the month of February 1823, the Duke sold the shares to *Grylls* for a valuable consideration, and that the said sale was a *bonâ fide* transaction; and that thereupon *Grylls* became the proprietor of the said three 50th shares. And the master was of opinion, that the three 50th shares in the mines then standing in the name of *Grylls* were not shares, of which he was to be considered a trustee for the benefit of the creditors, under the original and renewed commissions; but that the same, since the month of February 1823, had been and then were the absolute property of *Grylls*.

The case now came on to be heard by way of exception to the master's report, and for further directions.

Mr. *Jacob* and Mr. *G. Richards* for the assignees. It is clearly settled, that a solicitor to the commission

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cannot purchase any part of the bankrupt's property, either for himself or another, even though the purchase is perfectly fair on his part, and he bids openly in the presence of different persons interested in the property; *Ex parte Bennett* (a). Now in this case, *Grylls*, who was assignee of the bankrupt's estate, purchased the three shares in the mines as the agent of the Duke of Leeds, after which he takes them back from the Duke; and this the master calls a *bonâ fide* sale; which finding we object to. It is admitted, that the three shares in dispute are exactly now in the same situation, as they were at the time of the hearing of the petition by the Lord Chancellor, when his lordship made the order referring it to the master to take the account of what was due from *Grylls*. The terms of that order declare, "that as to the shares and parts of shares in the mines called Wheal Vohr and Wheal Vreah, which *Grylls* took, and had continued to retain, and also as to such shares, or parts of shares, as he took for his friends, but which they, or any of them, had declined to adopt, or had returned to him, he was to be considered a trustee for the benefit of the creditors." Now, the shares taken by *Grylls* for the Duke of Leeds must be considered to fall within the description of those which he took for his friends, and which they "had declined to adopt, or had returned to him;" as it is very plain, that the Duke did not wish to have the shares,—having through his agent, Mr. *Rackham*, expressed his objections to the speculation, and desired that the shares should be disposed of in the course of a year. It is not a question here, whether the transaction between *Grylls* and the Duke of Leeds was *bonâ*

(a) 10 Vesey, 381. And see *Ex parte Stone*, 6th June 1833, *post*.

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fide, or not. It is admitted to have been so. But we contend, that the master was not justified, from the terms of this order, in finding that there was a sale from *Grylls* to the Duke of Leeds, and a resale from the Duke to *Grylls*. The object of the Duke, in giving the note for 1000*l.* to *Grylls*, was to indemnify him from any loss he might sustain in holding the shares as a trustee for his grace. It does not appear, that any entry was made in Mr. *Grylls*' account with the Duke, debiting the Duke with the amount of the purchase money for these shares. The name of Mr. *Grylls* appeared all along in the books of the Company, as the ostensible owner of them; and the Duke has, in reality, not paid a single farthing for the shares. In February 1823 these shares become again the entire property of Mr. *Grylls*,—he says, as a purchaser for a valuable consideration, by returning the note for 1000*l.* to the Duke. But he nevertheless keeps the intervening profits on those shares, to the amount of 150*l.* And whether he is a lawful purchaser or not, is a pure question for this Court, and not for Mr. *Grylls*, to determine. The material point, however, which the Court has now to decide is, have these shares been *returned*, or not, to Mr. *Grylls*, within the meaning of the Lord Chancellor's order? We contend that they have been, to all intents and purposes, returned to him, by his delivering back the 1000*l.* note, which was the consideration alleged to be paid for the shares by the Duke.

Mr. *Montagu* and Mr. *Wray* appeared for Mr. *Grylls*, the other assignee.

Mr. *Montagu*.—It is admitted by the other side, that

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there was no collusion in this case between Mr. *Grylls* and the Duke of Leeds; and that when the Duke gave his sanction to the purchase of the shares for him by *Grylls*, as his agent, he never contemplated that *Grylls* should afterwards become the purchaser of them. All that he wished was, that the shares should be disposed of in the course of a year. We contend, moreover, that this transaction does not fall within the terms of the Lord Chancellor's order. That these shares cannot be considered, in fact, as those which any of *Grylls*' friends had "declined to adopt," or "had returned to him," or which he himself had originally purchased. With respect to the general rule contended for by the other side, that a solicitor to the commission, or an assignee of a bankrupt, shall, under no circumstances whatever, be permitted to become the purchaser of any part of the bankrupt's property,—we say, there may be exceptions to this rule, and that, although the rule may be general, it is not universal. Lord *Brougham* upon one occasion objected to consider the rule as inflexible, and said, "it was not to be held so strict as to deprive the Court of all understanding, and of its power to relax it, when it would operate unjustly. He did not see," he added, "why he was to be trammelled by a rule, which, though good in general, would not apply to every case."

Mr. *Montagu* was then proceeding to read one of the affidavits made by *Grylls* in the matter of the original petition, when

Mr. *Jacob* objected to the affidavit being read, as it was not in evidence before the master.

Mr. *Montagu*. On an inquiry before the master, all the affidavits filed on the original petition may be read.

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Erskine, C. J. If the practice is, as it appears to be, that on exceptions to the master's report, the affidavits on the original petition cannot be read, unless they have been made use of in evidence before the master, this affidavit cannot of course be read.

Mr. Jacob then consented that those parts of the affidavit might be read, which were necessary to explain Lord *Lyndhurst's* order.

Mr. Montagu, after reading these passages in the affidavit, continued to urge the unreasonableness of allowing no departure from the general rule. General rules are like crutches, which are made to help the weak, but of very little use to the strong and vigorous. But the general rule, which they set up against us, is not applicable to the case now brought before the Court. The simple question which the Court has now to decide is—were these shares any of those which *Mr. Grylls' friends declined to adopt*, or which were returned upon his hands? It cannot be doubted, that there was a real sale of them to the Duke of Leeds: he might, in fact, have sold them to me, if he had chosen, the very next day. The Duke himself has stated in his affidavit, that he sanctioned the purchase of these shares for him by *Grylls*; with the understanding, that they were to be sold again within the year, and that the Duke would stand to any loss. The Duke disliked his name being used as one of the speculators in the mines; and this was the reason for the shares continuing in the books of the company in the name of *Grylls*.

Sir A. Pell directed the attention of *Mr. Montagu* to the following expressions in the affidavit of Lord *J. T. Bionshend*, namely, "that the shares should be taken and stand in the name of *Grylls*, as a trustee for his

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grace;" and "that they *continued* standing in the name of *Grylls* as his trustee." Why is it not then open to the other side to contend, that the Lord Chancellor's order extends to this case, namely, "continuing to retain" in the character of trustee?

Mr. *Montagu*. If I can show, that he for one moment had them not, then he cannot be said to have "continued to retain."

Erskine, C. J. At the time of the Lord Chancellor's order, the shares were in the possession of Mr. *Grylls*.

Sir *G. Rose*. If you can establish the trust in the first instance, the shares being in the name of *Grylls* is a circumstance wholly immaterial. I hold the transaction between *Grylls* and the Duke of Leeds not as a purchase, there being no *price* paid for the shares. For, as to the promissory note alleged to be given by the Duke of Leeds, I think a Court of Equity would, under all the circumstances, have restrained *Grylls* from any proceeding he might have thought proper to institute on a security of this description. The whole transaction appears to me to have been merely an arrangement between the Duke and *Grylls*, which ended in *Grylls* becoming the owner of the shares himself. The case of *Mortlock v. Buller* (a) clearly shows, that a trustee cannot, under any circumstances, become the owner of the trust property. The shares in this case were bought by *Grylls*, then sold to the Duke, and afterwards repurchased by *Grylls*. Now if property is revested in A., does he not take it in the same way as when he was divested of it?

Erskine, C. J. In the order made by Lord *Lynd-*

(a) 10 Ves. 292.

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hurst, he appears to have viewed the whole arrangement relating to the eleven shares as one transaction, whether they were retained by *Grylls*, or were returned in any way from his friends: And Lord *Lyndhurst*, upon that occasion (*a*), particularly referred to the case of *Ex parte Bennett* (*b*), where it was held, that an assignee of a bankrupt could not even purchase for his friends.

Sir *G. Rose*. Here there is no sale, and there is a return, which lets in the doctrine of remitter. (*c*)

Mr. *Montagu*. We contend for the contrary of those two propositions,—namely, that there was a *sale*, and that there was no *return*. But if not strictly a sale, it was such a *bonâ fide* transaction, that the property was out of *Grylls* and in the Duke. And so far from there being a return of the shares, the last transaction can be considered in no other light than that of a repurchase.

Mr. *Wray*, on the same side. It is right the Court should understand the nature of the interest taken by the shareholders in these mines. The lord of the mine grants a lease of it to any one adventurer, who holds it

(*a*) See *Ex parte Badcock*, Mont. & M. 239.

(*b*) 10 Ves. 381.

(*c*) With great deference to the learned Judge, it would seem that the doctrine of *remitter* does not apply to this case. *Remitter* is defined to be the union of an ancient right and a subsequent defeasible estate in the same person,—the latter being cast upon him by operation of law, and not gained by his own act or consent, as by immediate purchase,—whereby the ancient right is restored and set up again, and the new defeasible estate is extinguished. Co. Lit. 348, 350; 3 Bl. Com. 20. The subsequent estate, therefore, which *Grylls* gained by his repurchase of the shares from the Duke of Leeds, being an estate acquired by his own act, and not by operation of law, he cannot, consistently with the above definition, be said to be remitted to his first estate, whether that estate is to be considered a trust estate, or one to which he was entitled for his own benefit.

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in trust for himself and his co-adventurers; and when the share of any adventurer is transferred, the practice is to make an entry of the transfer in the cost book. There appears to be no reason why *Grylls* could not re-purchase these shares, if he was not precluded from his situation as the agent of the Duke of Leeds. [*Erskine*, C. J. The question is, whether Mr. *Grylls* could, in the first instance, purchase the shares for the Duke of Leeds, or do that indirectly which he could not do directly.] Another question has been raised,—namely, whether the Lord Chancellor's order meant, that the shares retained by *Grylls*, as a trustee merely, were to be included in those shares “which he took and continued to retain.” It is clear, that the equitable property in the shares was parted with to the Duke of Leeds. *Grylls* was a mere agent for another person; he sends in a bill for his services; he exercised no discretion. But even supposing that *Grylls* was originally the purchaser of these shares, does he become a trustee for the creditors, because he re-purchases the shares after he had sold them to the Duke? The doctrine of remitter (*a*) does not extend to such a case. But the Duke of Leeds was in fact the original purchaser from the adventurers. Is the assignee of a bankrupt to be held liable to this extent, that whatever intermediate sales and purchases there may be of the property of the bankrupt, yet, if the assignee becomes eventually the purchaser, he is at any distance of time to be held to be merely a trustee for the creditors? The promissory note given by the Duke of Leeds to *Grylls* was the payment of the price, for which the shares were sold to the Duke; and though *Grylls* might have been pre-

(a) See note, ante, 303.

vented from bringing an action on it within a twelve-month, yet that stipulation does not render the transaction less a purchase. And if the Duke of Leeds, and not *Grylls*, was originally the purchaser of the shares, then the doctrine of remitter does not apply.

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Cur. adv. vult.

ERSKINE, C. J.—In this case, which came before us on two petitions, one raising an exception to the master's report, and the other praying us to confirm that report, the question in substance is, whether three shares in certain mines, which were taken by *Grylls* in his own name, but, as he alleges, as trustee for the Duke of Leeds, and which were subsequently held by *Grylls* for himself, are within the order of the Lord Chancellor made on a former hearing of this matter, which directs "that as to the shares and parts of shares in the mines called Wheal Vohr, and Wheal Vreah, which *Grylls* took and had continued to retain; and also as to such shares or parts of shares as he took for his friends, but which they or any of them had declined to adopt, or had returned to him,—he was to be considered a trustee for the benefit of the creditors." The order then directs, that if the parties should differ as to what shares he was to be so considered a trustee, the matter should be referred to the master. Upon this matter so referred to him the master has made his report; and he draws the conclusion, that the shares were, in the first instance, purchased by *Grylls* for the Duke of Leeds, and that such purchase was a *bonâ fide* transaction; that the shares were afterwards sold by the Duke to *Grylls bonâ fide* for a valuable consideration;

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and that, as to these shares, he was not to be considered a trustee for the creditors. The simple question, therefore, which we have now to decide is, whether Mr. *Grylls* is to be considered a trustee for those shares; and the fairest way to determine the point, as it appears to me, is to look at Lord *Lyndhurst's* judgment on the former hearing (a). For the judgment we have now to pronounce must depend on general principles, and not on the fairness of the transaction between Mr. *Grylls* and the Duke of Leeds. It appears by the facts of the case, of which there is no dispute, that the bankrupts had, at the time of their bankruptcy, certain shares in these mines, which *Grylls*, in his capacity of assignee, relinquished as a *damnosa hereditas*; that the mines were afterwards purchased by *Grylls* for 18,000*l.*, and eventually divided into fifty shares, of which *Grylls* took eleven for himself and his friends; but all of which, it must be remembered, were taken in his own name, without specifying how many he took for himself, or how many he intended for his friends. Four of these shares were afterwards assigned to Mr. *Trelawney*, and transferred into his name, and one to Mr. *Borlase* and Mr. *Plomer*, but *Borlase* returned his half-share. It appears, that of the remaining shares three were intended by *Grylls* for the Duke of Leeds, who afterwards consented to adopt them, on condition that they should be disposed of in the course of a year; that the Duke reluctantly assented to the speculation, and that *Grylls* was to hold them for him until they could be got rid of. It is but justice here to remark, that no one party at this period contemplated any profit from the adventure, nor until near a twelvemonth afterwards, when *Grylls* took

(a) See *Mont. & M.* 237.

the three shares again free from any interest of the Duke. Now the language of the order of the Lord Chancellor appears to me to reach these three shares taken for the Duke of Leeds, as being some of those shares "which *Grylls* took for his friends, but which they either declined to adopt, or returned to him." For, when *Grylls* took those shares again from the Duke, I can only consider that the Duke *returned* the shares to *Grylls*, on condition that he should deliver back the promissory note which he had previously deposited with *Grylls*. The transaction must come either within the first part of the order, specifying the shares which *Grylls* "took and retained," or within the second branch of it, which speaks of the shares which "he took for his friends, but which they had returned to him." For when we look at the language of the order, it is clear, that the view Lord *Lyndhurst* took of the case was a recognition of the principle, that an assignee could not purchase, either for himself, or another. The judgment (a), too, which he pronounced in the case, affords some explanation of the meaning of the order. "Looking at all the circumstances," he says, "it is clear that Mr. *Grylls* had, before the relinquishment of the bankrupt's interest in the mines, contemplated the formation of a new company or adventure, and by the effect of the arrangement he became possessed, although not specifically, yet substantially, of some part of the interest of the bankrupt." Mr. *Grylls* can hold this interest in the mine, in no other capacity than as a trustee for the creditors of the bankrupt; and the fact that he now holds a less interest, than that formerly possessed by the bankrupt, can

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make no difference in principle." This judgment Lord *Lyndhurst* pronounces, after referring at great length to the case of *Ex parte Bennett* (a); and from Lord *Eldon's* judgment in that case, the *bona fides*, or honesty of the transaction, forms no part of the principle on which the question should be decided. "Upon the general rule," Lord *Eldon* says, "both the solicitor, and the Commissioner, have duties imposed on them, that prevent their buying for themselves; and if that is the general rule, it follows of necessity, that neither of them can be permitted to buy for a third person; for the Court can with as little effect examine whether that was done, by making an undue use of the information received in the course of their duty, in the one case, as in the other." No exception therefore is made to the operation of the rule, but rather the contrary, where the purchase is made as a trustee for third persons. The same principle, which guided Lord *Eldon*, was that also on which Lord *Lyndhurst* acted in deciding this case. Neither of their judgments rests on the *bona fides* of the transaction; but on the general principle, that an assignee cannot purchase, either for himself, or another. This principle would of course have reached the shares bought for Mr. *Trelawney*, if he could have been brought before the Court; but he is not within its jurisdiction. The only remedy, therefore, against him was by bill; the order of Lord *Lyndhurst* being necessarily confined to those shares over which the Lord Chancellor had jurisdiction, as sitting in bankruptcy.

In this view of looking at the case, can it be denied that the order applies to the shares purchased by

(a) 10 Ves. 385.

Grylls, for the Duke of Leeds? Taking it even to be a purchase for the Duke *bonâ fide*, what Lord *Eldon* says *Ex parte Bennett* applies to the transaction; for even the Duke could not hold the shares upon a purchase made by *Grylls*. But these shares having come back to *Grylls*, and all right and interest in them having therefore become vested in him, were thus brought within reach of the jurisdiction of the Lord Chancellor sitting in bankruptcy. Therefore, notwithstanding the whole transaction was perfectly honest and fair, yet on the general principle, which Lord *Lyndhurst*'s judgment is founded, I am of opinion, that *Grylls* must be taken to hold these shares as a trustee for the general creditors of the bankrupts.

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Sir A. PELL.—I find the original entry as to these shares, in the books of the Mining Company, to be, "For Mr. *Grylls* eleven shares;" Mr. *Grylls* being an assignee under the commission, and an attorney under whose advice it was issued against the bankrupts. The question now before us is, whether the three shares, in which the Duke of Leeds at one time claimed a certain part of interest, are to be subject to the acknowledged rule in equity, that a trustee shall not purchase any portion of the trust property; and in discussing that question, I shall confine myself entirely to those three shares. In the judgment pronounced upon the former hearing of this case by Lord *Lyndhurst*, there are these remarkable words: "There has been no principle more wisely laid down, more universally recognized, or more rigidly adhered to by my predecessors in this Court, than that assignees of a bankrupt's estate shall not be permitted, either directly or indirectly, by themselves or by any circuitous mode, to become the pur-

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chasers of any part of the bankrupt's property. It matters not by what motives the parties may be actuated. They may be influenced by motives of the purest and most honourable character; but it must not be forgotten, that the motives of mankind can seldom be satisfactorily inquired into; whilst, on the other hand, there is danger to be apprehended from fraudulent practices, the proof of which is at all times difficult and uncertain." And Lord *Eldon*, in *Ex parte Bennett* (a), after a recognition of the general rule, says, "If that is the general rule, it follows of necessity that neither the solicitor, nor the commissioner, can be permitted to buy for a third person." And he adds, "the safest rule is, that a transaction, which under circumstances should not be permitted, shall not take effect upon the general principle; as, if ever permitted, the inquiry into the truth of the circumstances may fail in a great proportion of cases." Now, in this case, if the three shares in question were at any time vested in the Duke of Leeds, it was by virtue of a purchase of them made by *Grylls*, as assignee under the commission, and therefore within the rigid rule, that an assignee cannot purchase the bankrupt's property by any circuitous mode. The facts are clear—the rule is as clear—and no difficulty ought to have arisen. But the terms of the Lord Chancellor's order, it must be confessed, are not quite so easy to understand. An inquiry, however, into the nature of the property in dispute may throw some light upon the true construction of the order. What is the property in question? The property consists of shares in a mine, which are allowed to pass by way of transfer or assignment from one shareholder to another, by a

(a) 10 Ves. 400.

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written entry made in the books of the Company, and the purchaser signing his name in the books. Was this done by the Duke of Leeds? No such thing. The shares always stood in the books in the name of *Grylls*, the original purchaser. The conclusion I draw from this circumstance is, that these shares so continuing in *Grylls*' name, are within the terms of the Lord Chancellor's order. It is stated, however, in the affidavit of Lord *James Townshend*, that when *Grylls* bought the shares for the Duke, it was stipulated, that his grace's name should not appear in any way in the transaction, but that the shares should be taken and stand in the name of *Grylls*, as a trustee for the Duke. It appears, therefore, that *Grylls* purchased the shares on a *secret* trust. And if there is any one case, that would show the policy and good sense of the general application of the rule, this appears to be a case of that description. Then, with regard to the terms of the Lord Chancellor's order, which directs that as to those shares which *Grylls* took and had *continued to retain*, he was to be considered a trustee. Now has Mr. *Grylls*, or has he not, *continued to retain* these shares? Why, if they still stand in the books in his name, the inference is, that he not only took the shares, but also that he still continues to retain them. They certainly are not within the second branch of the order, namely, shares which his friends *declined to adopt*; nor, as it seems to me, can the shares be said to *have been returned* to *Grylls*, as they have always stood in his name in the Company's books. In delivering my judgment on this occasion, I wish it to be understood that I cast no imputation whatever on Mr. *Grylls*, or the Duke of Leeds, or Lord *James Townshend*, for I believe them to have

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been actuated by the purest motives. And however sorry I may be that this case should bear hard on Mr. *Grylls*, yet I think we are bound not to relax the strictness of the general rule, out of any consideration for the hardship it may occasion a particular individual.

Sir J. CROSS.—This appears to me to be a very short and clear question for our decision, although involved in a long and obscure detail of facts. The order of the Lord Chancellor refers it to the master to inquire what shares had been taken and retained by *Grylls*, in respect of which he was to be considered as a trustee for the creditors. The master, in his report, finds that the shares were purchased by *Grylls* for the Duke of Leeds, and were *resold* by the Duke to *Grylls*. Now it appears to me, that it was beyond the province of the master to do this, which was in fact reversing the order of the Lord Chancellor. It has been contended, that these three shares are not within the provisions of the order, because they were bought by the Duke, and sold again to *Grylls*. But the Duke of Leeds did not hear any thing of the original purchase of the shares by *Grylls* for a long space of time. In whose hands were they during the whole of that period? Why in those of *Grylls*. He then proposes to transfer the trusts upon which he held these shares from the creditors to the Duke. The Duke, although acquiescing in the arrangement, wished them to be disposed of as soon as possible; and in fact never intimated any thing like an unqualified acceptance of the shares. But if he did, they have got back again to *Grylls*, who, as it seems to me, never effectually parted with them. For in every sale or purchase of property there are two

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 Ex parte
 GRYLLS
 and others.

material ingredients necessary to complete the contract, namely, a consideration, and a transfer. Now the only thing here which is called a consideration, is the promissory note deposited by the Duke with *Grylls*, and the shares were never transferred into the Duke's name. The shares, therefore, were within that part of the Lord Chancellor's order, which speaks of the shares that *Grylls* "took and continued to retain." But in my opinion he has *declined to adopt* the shares as far as curtesy would allow, by returning them in the way he has done to *Grylls*. The master's report, therefore, appears to me erroneous in finding that the shares were *resold*.

Sir G. ROSE concurred, saying, that he could add nothing to the opinion he expressed yesterday.

The Order therefore was, that the three fiftieth shares in the mines, which the master found to have been purchased by *Grylls* for the Duke of Leeds, and to have been resold by the Duke to *Grylls*, were not the absolute property of *Grylls*, but were shares for which *Grylls* was to be considered a trustee for the benefit of the creditors seeking relief under the original and renewed commissions.



1832.

Southampton
Buildings,
July 2.

An equitable mortgagee of two policies of assurance, which the bankrupt had effected on his own life, writes to the insurance office, saying, "*I am holder of the under-mentioned policies,*" stating the particulars of the policies in question, and inquiring what sum the office would give, if they were delivered up to be cancelled:—
Held, that this was a sufficient notice to the office of a change of ownership.

Ex parte STRIGHT and another.—In the matter of
EYLES.

IN this case the bankrupt had before his bankruptcy deposited two policies of assurance, which he had effected with the Eagle Insurance Office on his own life, with a creditor of the name of *Worged*, for securing the sum of 300*l.* The deposit was accompanied with a written memorandum, signed by the bankrupt, as follows:

"The interest of 300*l.* in these policies I transfer to Mr. *John Worged*, of Ashford, Kent; for which value received has been had, with 5 per cent. interest.

"January 26, 1830.

J. E. Eyles."

Worged had obtained the usual order of the Court, referring it to the Commissioner to inquire whether he was an equitable mortgagee, or not, and for the sale of the policies, if the Commissioner should find in the affirmative. It appeared that some time after the policies had been deposited with *Worged*, but before the issuing of the commission, he addressed the following letter to the Secretary of the Eagle Insurance Office:

"Mr. *N. P. Smith*.

"Sir,—*I am holder* of the undermentioned policies, and shall feel obliged if you will inform me what sum the office will give if they are delivered up to be cancelled, with the consent of the parties.

"No. 79,766, 5 May 1829, 500*l.* *Maria Eyles*.

65,953, 19 Feb. 1822, 500*l.* *J. E. Eyles*.

"Your reply will oblige your obedient servant,

"Ashford, 19 October 1831. *John Worged.*"

The Commissioner found, that according to the au-

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thority of decided cases (*a*), and a late decision of the present Master of the Rolls, notice to the insurance office of an assignment by the bankrupt of a life policy was not necessary to be given on the part of the assignee of the policy, to render the assignment valid; but that in fact such notice was in this case given: and he therefore found, that *Worged* had a valid equitable mortgage on these policies of assurance, and accordingly ordered them to be sold by public auction.

The present petition was from the assignees of the bankrupt, praying the Court to reverse the order of the Commissioner.

Mr. *Moore* and Mr. *Sturgeon* in support of the petition. The deposit of the policies in this case did not amount to an equitable mortgage, so as to bind the assignees; as no valid notice was given to the office by the mortgagee. The notice given by *Worged* was nothing more than a letter of inquiry as to what sum the office would give for the policies. [Sir *A. Pell*. But it was an announcement that he was the holder of the security.] Nobody would infer from that letter that he had a lien on the policies. [Sir *A. Pell*. Is not the language of this letter, in common sense, enough to put the office on its guard? Sir *G. Rose*. The simple question is, whether the Commissioner's report is sufficient, or not. The Courts have held the least circumstance, in point of notice, sufficient; and here the mortgagee informs the office that he is the *holder* of the policies. Sir *J. Cross*. In the memorandum of transfer, I observe the bankrupt says, he transfers his

(a) See *Falkner v. Case*, 1 Bro. 125; *Jones v. Gibbons*, 9 Ves. 411. But see *Williams v. Thorp*, 2 Sim. 259.

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STRIGHT
and another.

interest in these policies; and the notice given to the office by *Worged* is not of the transfer of the *interest*, but of a transfer of the *policies*. But it does not appear, that the office made any objection to the form of the notice. What would have been the effect, if there had been no notice?] The office would then have been justified in paying the amount of the policy to the person, whose name appeared in their books as the owner of it. They might have thought, that the expression “holder” merely meant the holder for safe custody.

Sir A PELL. (a)—There are some points, really, so clear,—so free from all controversy and dispute,—that it presses a little on one’s patience to be called upon to discuss them. If there are any words sufficient in the English language to express a notification of a change of ownership, this letter to the insurance office contained full notice of that change. The petition must therefore be dismissed; and as this is so plain a case, and there are no grounds whatever for presenting the petition, I am of opinion that, to mark our sense of the impropriety of presenting it, the assignees should be made personally to pay the costs.

Sir J. CROSS.—I entirely concur with the Commissioner, and my learned colleague. The mortgagee was legally possessed of these policies, and of all right and interest in them; for there was an actual transfer of them made to him by the bankrupt in January 1830.

Sir G. ROSE concurred.

Petition dismissed with costs, to be paid personally by the assignees.

(a) *Erskine*, C.J. was absent through indisposition.

1832.

Ex parte WILLIAMSON.—In the matter of WILLIAMSON.Southampton
Buildings,
July 3.

MR. ANDERDON applied for time to answer the affidavits filed in support of the petition, which was answered for the 19th June, and was now standing in the paper for hearing. The affidavits were filed on the 20th June, and were very voluminous, consisting of 200 folios.

Where affidavits in support of a petition are very voluminous, the Court will give respondent time to answer them, upon payment of costs, although the petition is in the paper for hearing, and 12 days have elapsed since the affidavits were filed.

Mr. Montagu opposed the application, on the ground that it was made so long as twelve days after the filing of the affidavits, and there was no affidavit on the part of the respondent explaining the cause of the delay.

The COURT, however, thought it reasonable that the respondent should have time to answer the affidavits, on payment of the costs of the application, and of the day.

In the matter of FLETCHER.

Same place.
July 4.

MR. WIGRAM applied to the Court to rescind an order, which had been made on the 21st June last (*a*), for suspending the advertisement of the bankruptcy in the Gazette. The order had been obtained *ex parte*, and none of the proceedings before the Commissioners at the opening of the fiat were produced to the Court, when the order was procured.

Where the person against whom a fiat is issued applies to the Court for a suspension of the advertisement in the Gazette, and swears positively that he owes no debt to the petitioning creditor, it is not necessary that the Court should inspect the proceedings.

Sir G. Rose. As it was sworn by the bankrupt, that it was a fraudulent commission, we did not want to inspect the proceedings. When the objection to the

(*a*) See *ante*, 90, and *post*, 327.

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In re
FLETCHER.

commission is independent of the proceedings, as in this case, where the bankrupt swore before adjudication, that there was no debt whatever due from him to the petitioning creditor, there is no use to refer to the proceedings (a); and, indeed, there is no case where the Court is more imperatively called upon to make the order of which you complain, than upon such an affidavit as was sworn to by the bankrupt on this occasion. With regard to the application being made *ex parte*, the practice allows of its being so done; otherwise, the advertisement might appear in the Gazette, before the application could be granted.

Erskine, C. J. I do not see how you make out any grievance, by the suspension of the advertisement in the Gazette.

Mr. Wigram. The advertisement would prevent those persons who are indebted to the bankrupt from paying him the amount of their debts, which would be so much money saved to his creditors. The bankrupt is actually now secreting himself, and cannot be found.

The COURT, under the circumstances, allowed that notice of a motion to rescind the former order might be served upon the solicitor who obtained it.

(a) Where there is any doubt, however, from the bankrupt's own statement, as to the sufficiency of the debt, or the act of bankruptcy, an inspection of the proceedings seems then to be indispensable; *Ex parte Ainsworth*, 2 G. & J. 89. And when this case of *Ex parte Fletcher* came afterwards before the Court (on the 10th July) on an incidental question of costs, Sir G. Rose drew the following distinction as to the practice in this particular. Where the bankrupt has delayed applying for a supersedeas, and assignees have been elected, the Court has invariably withheld the proceedings from inspection; but if he makes the application *instantly*, and before the choice of assignees, the Court has in that case allowed the bankrupt to look into the proceedings, that he may know the evidence on which he has been declared bankrupt.

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Southampton
Buildings,
July 4.

Ex parte COOMBES.—In the matter of COOMBES and another.

THIS was a petition by one of two bankrupts, praying that a surviving assignee might be ordered to pay to him an allowance of 10% per cent. on the net produce of his estate, which had paid a dividend of 20s. in the pound; and there had been a final dividend declared also under the joint estate, under which the joint creditors had received more than 10s. in the pound. The commission was issued in July 1814, and two persons of the names of *Farmer* and *Howard* were chosen assignees. The bankrupt obtained his certificate on the 20th October 1814, and a final dividend was declared under his separate estate in 1820, when *Farmer* alone signed the audit paper, admitting that 346*l.* 12*s.* 11*d.* was reserved by the assignees and applicable to the claims of the joint creditors. *Farmer* subsequently died; and the excuse set up by *Howard*, the surviving assignee, for not paying the allowance, was, that the money never came to his hands, but was received and retained by *Farmer*, the deceased assignee.

One of two assignees admits in the audit paper, previous to a dividend, that a certain sum was reserved by the assignees, applicable to future claims. The bankrupt, on a petition for his allowance after the death of this assignee, is entitled to an inquiry whether any part of that sum ever came to the hands of the surviving assignee.

Mr. *Ching*, in support of the petition, contended, that although *Howard* did not sign the audit paper, which admitted the sum above mentioned to be in the hands of the assignees, he signed other papers at the audit meeting equivalent to such an admission. But assignees are jointly and severally liable; and it is said by the Vice-Chancellor in *Ex parte Griffin*(a), that “if by the act of one assignee, out of the course of his duty,

(a) 2 G. & J. 116.

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Ex parte
COOMBS.

the trust property is placed within the single power of the other assignee, there is no doubt but both are liable."

Mr. *Twiss* for the surviving assignee. It appears, that the final dividend was made so long ago as the year 1820, and the bankrupt lets twelve years go by without making any claim for his allowance. There is, however, in this case, not only the absence of all proof that *Howard* ever received a farthing of this money, but it does not appear even from the terms of the audit paper, that the money was ever actually in the hands of either of the assignees.

Mr. *Ching*. The bankrupt's allowance ought to be paid out of the money reserved for dividends, as this sum is stated to be in the audit paper.

Sir G. ROSE.—You do not raise that point on the facts stated in your petition, which merely alleges that there is a certain sum found by the Commissioners in the hands of the assignees. There may be a question, too, whether you should not have brought the representatives of the deceased assignee before the Court. Until the 6 G. 4. c. 16, you had no right, as a single bankrupt under a joint commission, to any allowance, unless you could prove that every other party against whom the commission issued was also entitled to it (*a*).

Sir J. CROSS.—I find, that the 132d section of the Bankrupt Act (*b*) enables the bankrupt to call upon

(*a*) See the 129th section, which now relieves the bankrupt from this hardship.

(*b*) 6 G. 4. c. 16.

ignees, to declare to him how they have disposed of the estate. He has a right, therefore, to inquire of the surviving assignee, whether he knows any thing of this money, and how it has been applied.

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Ex parte
COOMBS.

SKINE, C. J.—It appears strange, that the bankrupt should suffer a final dividend to be made, without claiming his allowance; although the Commissioners find a surplus of 346*l.* 12*s.* to remain in the hands of the assignees. I think, however, that there ought to be an inquiry, but that it should be confined to the surviving assignee.

Order made accordingly, that it should be referred to the Commissioner to inquire, whether any and what part of the sum of 346*l.* 12*s.* ever came to the hands of the surviving assignee, and whether such money is applicable or not to the payment of the bankrupt's allowance.

Ex parte WILLIAM KEDIE and JOHN HOUGHTON.—In the matter of JAMES HOUGHTON and JOHN WATTS.

Southampton
Buildings,
July 4.

It was a petition of the trustees under the marriage settlement of the bankrupt *Houghton* and his wife, praying that the trustees might be allowed to prove the debt of 1451*l.* 13*s.* 4*d.* against the joint estate of the bankrupt and his wife.

The two trustees under the marriage settlement of *H.*, a bankrupt, advance him, on the security of his bond, the

sum of the trust fund, (which was his wife's fortune,) for the purpose of being employed in business; and one of the trustees afterwards enters into a parol agreement with *H.* and his wife, that the loan should be considered a debt due from the partnership:—*Held*, that this parol agreement was in the nature of a collateral security, and that the trustees could not prove the debt against the joint estate and the separate estate of *H.*, making their election afterwards from which estate they would receive dividends.

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Ex parte
KEDIE
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two bankrupts, and also upon the separate estate of *Houghton*, the trustees making their election from which estate they would receive dividends.

It appeared, that by the trusts of the settlement the sum of 1300/., which was the wife's money, was settled upon the petitioners, upon trust after the solemnization of the marriage to lend and advance the same to the bankrupt, *James Houghton*, for twelve calendar months, upon his bond, payable with interest, and at the discretion of trustees, either to continue the same on such security, or to call it in. After the marriage, it was agreed between *Houghton* (the bankrupt) and his partner *Watts*, that *Houghton* should procure this money for the use of the partnership; and *Houghton* accordingly applied to the trustees for that purpose, who, under the power given to them by the settlement, advanced the 1300/ to *Houghton* the bankrupt; who on the 5th December 1827 gave his bond to the trustees, to secure the repayment of the money with interest on the 5th December following. On the day after *Houghton* received this money from the trustees, he paid it over to his partner *Watts* for the purposes of the partnership, and an entry of the receipt of the money was made in the partnership cash book. After this advance, *Kedie*, one of the trustees, had an interview with both the bankrupts at their house of business; when they informed him that the money had been borrowed on the partnership account, and had been applied to the purposes of their joint trade; and it was then agreed between *Kedie* and the bankrupts, that their firm was to be considered liable to the trustees for the repayment of the money, with interest, as a partnership debt; and that as the trustees lived at a distance in the country, and as

Houghton was entitled under the settlement to receive the interest on the 1300*l.* for his life, such interest should be paid by the partnership to *Houghton*, instead of its being remitted to the trustees and by them paid over again to *Houghton*. In pursuance of this agreement, an account was opened in the partnership private ledger, entitled, "The trustees of Mrs. *Houghton*," in which the sum of 1300*l.* was placed to their credit with the partnership. The trustees stated, that they allowed this sum to continue on loan to the partnership after the time limited in the bond, in the confidence that under the agreement they had entered into with the bankrupts, the partnership would continue liable to the trustees for the repayment of the money. The amount due to the trustees for principal and interest at the date of the commission was 1451*l.* 13*s.* 4*d.*, which sum they applied to prove against the joint estate, as well as the separate estate of *Houghton*, reserving their election to receive dividends out of either of those estates; but the Commissioner, Mr. *Fane*, rejected the proof upon the joint estate. The present petition, therefore, was by way of appeal from his decision.

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KEDIE
and another.

Mr. *Twiss* and Mr. *Flather* appeared in support of the petition. The members of a partnership may agree to make that a joint debt, which was first a separate debt; and in this case there was the consent of both partners that the 1300*l.* advanced by the trustees should be considered a joint debt. Even if the money had not been trust money, that agreement would make the joint estate liable; but the principle will apply with greater force to trust monies used for the purposes of a partnership. That the money in this case was so ap-

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KEDIE
and another.

plied, is sufficiently shown by the entries in the partnership books, as well as by the agreement made between the two bankrupts previous to the loan of the money by the trustees to the bankrupt *Houghton*. And it may be collected from what Lord *Thurlow* says in *Ex parte Jackson(a)*, that where one partner is indebted by bond, the payment of interest on the debt by both the partners will make the joint estate liable for the debt, where a joint commission is issued against the two partners.

Mr. *Swanston* and Mr. *Keene* for the assignees. The question in this case is purely one of law,—whether that which was first a separate debt can be converted into a joint debt. The trustees originally lend this money to *Houghton* on his separate bond, without any mention of the purposes to which he meant to apply it; and it is not because he uses the money in the partnership business, that it becomes a partnership debt due to the trustees. Our proposition is, that there is not sufficient evidence in this case of the debt being a joint debt from the two partners. In order to convert a separate debt into a joint one, there must be the consent of all the contracting parties. Now here there were two joint creditors, who made a separate loan to the bankrupt *Houghton*, and only one of those creditors was a party to the agreement alleged to have been made afterwards with *Houghton* and his partner. That distinguishes this case from the case of *Ex parte Clowes(b)*, which might have been cited in support of the petition. The entries in the partnership books do not affect the law of the case. A loan of trust money is not in its nature different from

(a) 1 Ves. jun. 131.

(b) 2 Bro. 595.

a loan of any other money, except as to what constitutes a breach of trust; and that is not pretended in this case. The question is here, whether a simple contract agreement can be made with one of two joint obligees of a bond, so as to affect the liability of the obligor to both the obligees. If that cannot be done, how can the trustees in this case, to whom the bond was given by *Houghton*, take advantage of the subsequent parol agreement, made by one of the trustees with *Houghton* and his partner *Watts*? [Sir J. Cross. The parol promise of the two, and the bond of the one, are both collateral and independent securities.] The bond was conditioned for payment in a twelvemonth; but if the separate debt of the one was to be converted into a joint debt of the two, it might have been recovered *instanter*, which would materially have varied the original contract of the parties.

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and another.

ERSKINE, C. J.—I can entertain no doubt, that this constituted a joint debt. The money was borrowed for partnership purposes, and was so applied,—Mr. *Kedie*, one of the trustees, becoming a party to the contract. And I think it would be no answer to an action at law against two partners for money lent to them to be employed in their business, that one of the parties had given a bond for the same debt. It cannot be doubted, after the case of *Ex parte Jackson (a)*, that under a commission of bankrupt the amount of a bond debt due from one partner, which has been adopted by both partners, may be proved against the joint estate. Now what are the facts here? It appears, that after the money was advanced by the trustees to

(a) 1 Ves. jun. 131.

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KEDIE
and another.

Houghton, Kedie had an interview with both partners, when they admitted that the money had been borrowed for the use of the partnership, and had been so applied, and agreed to consider it as a partnership debt. *Kedie* consents to this. Then, when we turn to the books of the partnership, we find there a regular entry made of this very money being advanced, and credit given for the amount to "the trustees of Mrs. *Houghton*." Upon the evidence, therefore, afforded by these books, and this credit account, I have no doubt, that the debt was properly admissible in proof against the partnership. For, as I have already intimated, I think it is no answer to a joint action against several joint contractors, that one had given to the creditor a separate security.

Sir A. PELL.—I think the case of *Ex parte Jackson*, as well as that of *Ex parte Williams (a)*, both show, that there may be an agreement of the creditor to make that a joint debt from two, which was originally a separate debt from one. The Commissioner, therefore, appears to me to have acted erroneously; for it is too much to say, that the trustees have not in this case a right to elect under which estate they will claim their dividend.

Sir J. Cross.—I entirely agree with what has been said in the argument for the respondents, namely, that a specialty debt contracted by *A*. cannot by a mere parol agreement be converted into a simple contract debt of *A*. But it may be made a consideration for

(a) Buck, 13.

a simple contract debt of *A.* and *B.* In this case, the creditor makes an express stipulation, by way of collateral security, that the two partners should be jointly liable for a debt previously contracted by one, and they consent. I therefore think that the petitioner is entitled to take his dividend either out of the joint estate of the partnership, or the separate estate of *James Houghton*.

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KEDIE
and another.

Sir G. ROSE concurred.

Order made pursuant to the prayer of the petition; and costs of all the parties directed to be paid out of the estate.

Ex parte FLETCHER.—In the matter of FLETCHER.

Southampton
Buildings,
July 6.

THIS was a motion to discharge or vary an order (a), which had been made for staying the advertisement of the bankruptcy in the Gazette.

Where a trader, against whom a fiat issues, swears that he owes no debt to the petitioning creditor, and has committed no act of bankruptcy, the Court will stay the advertisement in the Gazette; *à fortiori*, if there does not appear to be a clear debt and act of bankruptcy on the proceedings.

Mr. *Wigram*, Mr. *K. Parker*, and Mr. *G. Richards*, now appeared in support of the motion; and read an affidavit of a witness, who swore that there was a good trading, a good petitioning creditor's debt, and a good act of bankruptcy. The bankrupt has sworn the contrary. But if there is any doubt on the subject, we have got the legal right to have the adjudication, by

(a) See *ante*, p. 90. It appeared, that the order to suspend the advertisement had been made on the affidavit of the bankrupt, stating that there was no debt due from him to the petitioning creditor, and that the petitioning creditor had filed a bill in Chancery against the bankrupt for a partnership account.

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FLETCHER.

the decision of the Commissioners in our favour, who had all the witnesses before them, and were competent to decide. Then as to the Chancery suit. Why is a petitioning creditor, who has filed a bill against the bankrupt, to be prevented from taking out a fiat, any more than a creditor who sues out an execution against the bankrupt? The fiat is issued for the benefit of the creditors at large; and are they to be deprived of this benefit, because the person who has the carriage of the fiat has proceeded in Chancery against the bankrupt? But supposing the petitioning creditor's debt, or the act of bankruptcy, is not a good one, we may supply the defect by proving others. In the case of a petition to supersede the commission issued against *White and Metcalf*, where there did not appear to be any clear act of bankruptcy on the proceedings, Lord *Lyndhurst* said, *non constat* that other acts might not be proved; and refused to supersede the commission on this ground alone. But here there is no such defect on the proceedings; and in such a case Lord *Eldon* refused to suspend the advertisement of the bankruptcy in the Gazette (a). Then, as to the publicity occasioned by an advertisement appearing in the Gazette,—the different affidavits which have been made, and the proceedings in this Court, have already made the matter public enough, without any injury to be apprehended from any further publication of it.

Mr. *Temple*, Mr. *Swanston*, and Mr. *Bichner*, who appeared for the bankrupt, in opposition to the motion, were stopped by the Court.

(a) *Ex parte Ainsworth*, 2 G. & J. 89.

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ERSKINE, C. J.—The Court has looked carefully through the proceedings, and the affidavit on which the application for the order was founded. But we thought the affidavit, in the first instance, before we had seen the proceedings, quite sufficient to justify the Court in making the order to suspend the advertisement. And now that we have seen the proceedings, we are of opinion that the requisites to support the commission have not been made out, as they ought to be, and would be required, upon the trial of an issue.

Sir A. PELL.—All I can say is, that when I refer to the Lord Chancellor's judgment in *Ex parte Ainsworth*, I do not think, upon looking at these proceedings, that there is enough in them to justify us in discharging the order.

Sir J. CROSS.—As there has been a petition presented to supersede this fiat, and that question will shortly come before us, it seems to me highly expedient, that the advertisement of the bankruptcy in this case should in the meantime be suspended.

Sir G. ROSE.—I apprehend, that there is no principle more clear in the bankrupt law than this,—that when a trader, against whom a commission had been issued, came before the Lord Chancellor, and swore that he owed no debt to the petitioning creditor, and had committed no act of bankruptcy, but that, on the contrary, he was perfectly solvent, and that he should be ruined if he was adjudged a bankrupt in the Gazette,—the Chancellor was uniformly in the habit of suspending the advertisement. All that was required was, an affidavit of no act of bankruptcy, and of solvency. If the pro-

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Ex parte
FLETCHER.

ceedings, indeed, were right on the face of them, then the Court would not interfere. But looking at these proceedings, I could never as a Judge direct a jury to find an act of bankruptcy on such evidence as is there set forth. When I find, therefore, that the ostensible object in issuing this fiat was to dissolve an existing partnership between *John Fletcher* and *Joseph Fletcher*, that a bill in Chancery was filed by one partner against the other, and that a cross-bill was also filed between the same parties, I think it was against good faith to resort to another independent process than that which the parties had pledged themselves to adopt by the institution of these suits in equity, where every right depending between them might have been more properly adjusted.

Motion dismissed with costs, but with liberty for the party to apply to the Court again on that point, if in the result he should be able to support the fiat.

Southampton
Buildings,
July 9.

Ex parte GLADDISH.—In the matter of SANGSTER.

Where a petition is in the paper for hearing on *Monday*, and the respondent only files his affidavits on the previous *Saturday*, the petitioner is entitled to an order for time to answer them.

THE respondent in this case had only filed his affidavits on *Saturday*, and the petition being set down for hearing in the paper of this day, the following *Monday*,

Mr. *Swanston* and Mr. *Keene*, for the petitioner, objected to the affidavits being read, as the petitioner had not had time to answer them. They had no objection to proceed with the hearing, if the affidavits

were not read; but if the reading of them was insisted upon, they must apply to adjourn the hearing on payment of the costs of the day.

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Ex parte
GLADDIS.

Sir G. ROSE.—Your course is clear. They have certainly a right to read the affidavits; but if they do, you have a right to apply for time to answer them.

The hearing was accordingly adjourned, on payment of the costs of the day.

Mr. Montagu appeared for the respondent.



Ex parte BOLAN.—In the matter of **HALL** and another.

*Southampton
Buildings,
July 9.*

MR. ANDERDON applied to the Court, that the fiat in this case might be directed to Commissioners at Hexham, in Northumberland, instead of being directed to a London Commissioner; on an affidavit, that the major part of the creditors, and the witnesses to prove the requisites of the bankruptcy, as well as one of the bankrupts, resided in the counties of Durham and Northumberland, and that all the effects of the bankrupts were also in one or the other of those counties.

Where a country fiat will be preferred to a London one.

The COURT made the Order accordingly.

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Southampton
Buildings,
July 9.

Ex parte ELSEE.—In the matter of JOYNER.

When an order has been made for the taxation of the solicitor's bill of costs, *semble*, that a subsequent petition for the costs of the taxation cannot be heard, until the Master has made his certificate, nor unless the original petition is also set down in the paper.

IN this case the Vice-Chancellor had made an order, under the old jurisdiction in bankruptcy, for the taxation of the bills of costs of the solicitor under the commission; and reserved the consideration of the costs of the petition and the taxation, until after the Master had made his certificate; with liberty however, in the meantime, for either party to apply. It appeared, that the amount of the bills was more than 1700*l*.—from which 700*l*. and upwards had been taken off on taxation. The present petition was for payment of the costs of the taxation, and the costs of the original petition; but the original petition had not been set down in the paper, nor had the Master made his certificate under the Vice-Chancellor's order. The petition was not opposed, the solicitor not having instructed counsel to appear on his behalf.

The COURT, after much discussion on the point of practice, expressed a doubt whether they could make any order on this petition, until the Master had made his certificate under the former order, and the original petition was set down, as well as this petition, in the paper. But the solicitor, who was present in Court, and wished to instruct counsel to oppose the petition, agreed to waive these objections, if the Court would permit the matter to stand over to a future day. And so it was finally arranged.



1832.


In the matter of *SELL*.*Southampton
Buildings,
July 9.*

THIS was a petition to annul a fiat for want of prosecution, and to proceed with a second fiat, which had been issued by another creditor, after the time had elapsed for the prosecution of the first. It was stated on affidavit, that the petitioning creditor under the first fiat was staying at the bankrupt's house,—that an attempt had been made to serve her with the petition, but that she could not be seen, on account of alleged illness.

Special order made for the service of a petition to annul a fiat, where the party is not to be met with.

Mr. G. Richards now applied to the Court for an order, that leaving a copy of the petition at the bankrupt's house, might be deemed good service.

The COURT, after some hesitation,—as it was not positively stated in the affidavit, that the petitioning creditor was actually living at the bankrupt's house,—made the order for the petition to be served on the solicitor who took out the first fiat, as well as by leaving a copy of it at the bankrupt's house.



1832.

Southampton
Buildings,
July 10, 1832,
and June 20, 21,
and July 4,
1833.

A joint and several promissory note was made by several parties concerned in a joint undertaking, for the purpose of securing the repayment of a loan of money; and one of the parties signs it some days after the party who borrowed the money:—*Held*, that the note did not require an additional stamp, if the last signature was put *before* the money was advanced,—or if the party last signing had *promised* to sign the note *before* the advance of the money, notwithstanding it might not have been signed till afterwards.

Although six months is the time limited by the practice of the Court, for presenting a petition for rehearing,—*semble*, that under special circumstances it may be dispensed with.

The rule that no petition for rehearing is allowed for costs only, does not apply (*come semble*,) to a petition for a rehearing on the ground of an erroneous decision on the merits, although the material effect of such decision may be to render the party liable for costs.

Ex parte HENRY WHITE.—In the matter of ANNA MARIA JOHNSON.

THE bankrupt in this case had kept a public house, and a commission was issued against her on the 19th May 1830, on an act of bankruptcy committed on the 14th of the same month. The petitioner claimed to be admitted a creditor for the balance due to him as the indorsee and holder of the joint and several promissory note of the bankrupt and eight other persons, which was in form as follows:

“ £1000.

London, April 15, 1825.

Four months after date we jointly and severally promise to pay to Mr. *John White* or order, the sum of one thousand pounds with interest.

T. H. Worrall, 93, St. John Street.”

(Then came the signatures of eight other persons before that of,)

“ *Anna Maria Johnson, 63, West Smithfield.*

Witness the parties' signatures hereto,

Thomas James Selby, 38, Great Surrey Street.”

This note was on a 12s. 6d. stamp. On the 9th July 1830 the petitioner tendered his proof on the note before the Commissioners, and proved that the consideration given for it by *John White*, the payee, was the advance made by him of the sum of 1000*l.* by way of loan to *T. H. Worrall*, the first-named maker of the note, for the purpose of working a copper mine called the Legossick Mine, in Cornwall; in which *T. H. Worrall*, and the other parties, whose names were subscribed as makers of the note, were shareholders and co-adven-

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WHITE.

turers. But it appearing to the Commissioners, upon the examination of *T. J. Selby*, the attesting witness to the note, that the money had been advanced upon it a day or two before it was signed by the bankrupt, and that she had made no previous promise or agreement to sign any such note, they rejected the proof. A petition was thereupon presented to the Lord Chancellor, praying that the proof might be admitted, which came on for hearing before the Vice-Chancellor on the 1st December 1830, when he directed the following issue to be tried in the Court of Common Pleas, namely,—whether at the date of the commission the petitioner had any and what debt proveable under it; in which issue the petitioner was to be plaintiff, and the assignees of the bankrupt defendants; and it was ordered that both the petitioner and the bankrupt might be examined on the trial as witnesses, as well as certain creditors of the bankrupt, without any objection being taken to their testimony; and that a judgment (obtained by the petitioner against the bankrupt on the 17th May 1830,) should not be conclusive evidence of any debt being due to him from the bankrupt. This issue was tried on the 28th November 1831 before Lord Chief Justice *Tindal*, when the plaintiff proved a judgment obtained against the bankrupt on the 25th May 1820 for 620*l.* on the promissory note; and then called *Selby*, the attesting witness to the note, who swore that it was signed on the day it bore date, or a day or two afterwards, and was given for money which was *to be advanced*,—although he acknowledged before the Commissioners, that the money *had been advanced* before the note was signed by the bankrupt. In support of the case of the assignees, the bankrupt was called as a

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WHITE.

witness; and upon her cross-examination by the plaintiff's counsel, a paper was produced with her signature, which purported to be a guarantee to *J. White* for the repayment of such money as he might advance for the use of the mine, and which bore date on the 15th March 1825, just a month before the date of the note. Above the signature of the bankrupt to this document, a piece of the paper on which it was written had been cut out, and another piece pasted on; which circumstance a witness of the name of *Worrall*, who appeared to be an attesting witness to this guarantee, endeavoured to account for. The petitioner, *Henry White*, was not called as a witness on either side. The Chief Justice directed the jury, that if they should be of opinion, upon the evidence, that the bankrupt had signed the note before the money was advanced by *J. White* to *T. H. Worrall*,—or that she had made any promise or agreement to sign such a note,—they should find a verdict for the plaintiff; unless they should be satisfied, that the indorsement to *H. White*, the petitioner, was merely fraudulent and colourable;—but that if they were of opinion, that the bankrupt had neither signed the note, nor made any promise or agreement so to do, until after the transaction had been concluded by the advance of the money upon the note as then signed,—or that if they were of opinion, that there was no *bonâ fide* transfer of the note to *H. White*, but that the indorsement was merely fraudulent and colourable,—then they were to find a verdict for the defendant. The jury found a verdict for the defendant.

On the 19th December 1831, a petition was presented by the assignees to the Lord Chancellor, praying that *H. White* might be ordered to pay the costs of

the original petition, as well as the costs of the trial at law, and of this subsequent petition of the assignees, and that the original petition might come on for hearing, together with the subsequent petition. A cross-petition was also presented by *H. White* to the Lord Chancellor, praying for a new trial of the issue, or that a case might be settled, and the opinion of a Court of Law obtained thereon. All three petitions remained in the Vice-Chancellor's paper for hearing, when the Bankruptcy Court Act came into operation, and it was agreed by the parties that the matters of these several petitions should be brought on by way of motion in the Court of Review.

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Mr. *Swanston* for the petitioner, *H. White*, now moved accordingly for a new trial of the issue at law, on the ground that the conclusion of the jury was not a rational conclusion from the evidence, and, if not contrary to the direction of the learned judge, that it was at any rate against the leaning of his opinion. When the case was originally before the Vice-Chancellor, it was argued as a case of partnership, the bankrupt being one of the shareholders in the mine. The petitioner's case also upon the trial began with the liability of the bankrupt, as a shareholder in the mine; and, in the course of the trial, it appeared, that previous to the date of the note she had signed a guarantee to repay *J. White* all such money as he might advance for the use of the mine. [Sir *A. Pell*. The guarantee would certainly dispose of the case at once, if genuine.] The evidence was clear as to the hand-writing, and the genuineness of the guarantee. With respect to the time of the signature of the note by the bankrupt, the evidence

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at the trial was very strong, that her signature was affixed to it before the money was advanced. But whether that was so or not, is a circumstance wholly immaterial; for though the consideration for the note might have passed before her signature, it was not the less a good and valuable consideration for this promissory note, which is *joint*, as well as several. It has been decided, that if it was part of the bargain between the payee and one of the makers of a joint promissory note, that the other maker should afterwards sign it,—the latter might sign it at any time subsequent to the signature of the first maker, without the necessity of any additional stamp; *Clerk v. Blackstock* (a). As against *J. White*, the original payee, the demand could not be resisted. Then what is the distinction as against *H. White*, the indorsee? [*Erskine*, C. J. If it was not a real transaction, the indorsee could have no better right than the indorser.] The evidence of *J. White*, as to the transfer of the note to his brother, is clear; there can be no objection to the right of action of the brother, founded on that negotiation. At the time of the transaction in question, it appears that *J. White* had no interest in the mine, and that his brother reproached him for lending money on such insufficient security. Yet bad as this security was, *H. White* took it from his brother, as a *tabula a naufragio*. There is nothing improbable in this statement. [Sir *A. Pel* The judge who tried the cause has, in his report of the trial, not expressed himself dissatisfied; and therefore we must take it that he was satisfied.] Whether was satisfied, or not, this Court is not to be guided

(a) Holt, N. P. Rep. 474.

circumstance. This position has often been used by many Chancellors.

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Tennant, contra, maintained that this case was by fraud, and supported by false swearing. Principal witness called upon the trial, in support of the claim of the petitioner, was *Selby*, the principal witness to the note; who, on two different occasions before the Commissioners, swore directly the contrary of what he swore upon the trial. When the note was produced at the trial, it appeared that a piece of the paper above the signature of Mrs. *Johnson* had been cut out, and another piece pasted on it; and the Chief Justice strongly commented on that fact in his charge to the jury. [Sir *A. Pell*. It appears to me incredible, how that piece of paper came to be cut out. *H. White*, the petitioner, was not examined at the trial, although this was expressly directed by the order of the Vice-Chancellor. There is, indeed, a marked distinction in the terms of the order, as to the examination of *H. White*, and of *J. White*.

With respect to the examination of *H. White*, the order is, "that the said *H. White*, and the said *J. White*, should be examined on the trial, and that no objection should be taken to the examination of the said *J. White*, on the ground of his being the plaintiff in the said issue, or to the examination of the bank-note on account of her being in any manner interested,—" thus making it a positive direction that *H. White* should be examined at all events. But in relation to *J. White* the words are merely, "that as well as the plaintiff, as the said defendant, should be at liberty to examine the said *J. White*." [*Erskine, C. J.*

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All that could be required of either party at the trial was, not to object to the examination of *H. White*; neither party could insist on the other calling him.] The bankrupt was, however, called by the assignees, and underwent a long cross-examination by the other side; and it was evidently the intention of the Vice-Chancellor, that *H. White* should have been also subject to a like cross-examination. Then, with regard to the alleged guarantee, this was never in any way alluded to, when the case was heard before the Vice-Chancellor; although the main point to be inquired into was, whether *Mrs. Johnson* had signed the note, or made any promise or acknowledgment of her liability to *J. White*, before the money was advanced. The guarantee seemed to be quite an after-thought of the petitioner; for it made no part of his original case, even upon the trial, but was brought forth on the cross-examination of the defendant's witnesses. Where an issue is directed by a Court of Equity, and the evidence given by one of the parties is calculated to defeat the trial of the merits, and to disappoint the intention of the Court in directing the issue, the Court will not, upon the application of that party, grant a new trial; *Carrington v. Jones* (a).

Mr. *Wright*, on the same side, was stopped by the Court.

Mr. *Swanston* in reply. At whatever period of the trial the guarantee was produced, the document, if genuine, ought to have precisely the same effect. It is clear, that there was a partnership subsisting between

(a) 2 Sim. & Stu. 135.

he bankrupt and the other makers of the promissory note, as joint share holders in the Legossick Mine; and when money is advanced for the general purposes of the adventure, it forms a good consideration for one of the joint adventurers giving a promissory note. It does not appear, that the bankrupt was entrapped into this speculation, or into the signing of the note in question; and she admits the signature to be her's. Although there may be something of discrepancy in the evidence of *Selby* at the trial, compared with his examination before the Commissioners, yet it is not sufficient to impeach his moral character; and there is nothing whatever to impeach the testimony of *Worrall*, the attesting witness to the guarantee, who swore that he borrowed the sum of 1000*l.* from *J. White*, on behalf of the shareholders, and that he expended it for their use in the mine. The consideration for the note is not denied, any more than the bankrupt's signature to it. The petitioner has therefore made out a strong *primâ facie* case, which would require very satisfactory evidence of fraud to rebut; and whatever imputations of that kind have been brought out by the other side, these afford a still more urgent reason for further inquiry.

ERSKINE, C. J.—This is a question arising out of a petition by *Henry White*, to have the proof of a debt admitted against the estate of *Mrs. Johnson*, the bankrupt, which had been rejected by the Commissioners. The onus therefore lies on him, to make out a lawful debt owing to him by the bankrupt, for the purpose of substantiating his right of proof. The debt he sets up is a joint and separate promissory note, which the bankrupt has signed in conjunction with several other persons. He makes out a *primâ facie* case by the produc-

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tion of this note, and proving the signature of Mrs. *Johnson*. But the Commissioners are not satisfied with this evidence, and institute an inquiry into the nature of the consideration that was given for the note; and on the examination before them of a witness of the name of *Selby*, it would appear, that the note was given in consideration of 1000*l.* advanced by *John White* for the use of the Legossick Mine, in which Mrs. *Johnson* had a 20*l.* share. But *Selby* stated a fact before the Commissioners which raised an objection to the proof, namely, that the money was advanced on the security of the note, before it was signed by Mrs. *Johnson*; which would be an objection to the validity of the note under the provisions of the stamp act, as it would then require an additional stamp; but this would not be an objection, if Mrs. *Johnson* had been a party to the original borrowing of the money. That difficulty being raised, the Vice-Chancellor directs an issue, whether *Henry White* had any debt proveable under Mrs. *Johnson*'s commission. The jury find no debt. The Court has looked through the whole of the evidence adduced at the trial, as contrasted with the evidence on the former inquiry before the Commissioners; and if it is not dissatisfied with the result of such examination, the verdict must stand. One of the parties, *Henry White*, it appears, was not examined upon the trial, although the Vice-Chancellor had directed him to be so. *Henry White*, however, was himself the plaintiff upon that issue, and the petitioner in the present instance; it was for him to have tendered himself for examination, and therefore he cannot raise the objection that he was not called by the other side. It is said in support of the petition for a new trial, that the verdict of the jury was contrary to

the evidence; but this does not appear to me to be the case. All the facts and contradictions were before the jury, and they have shown by their verdict, that they did not believe either *Worrall* or *John White*, who swore that the note was signed by Mrs. *Johnson* before the money was advanced,—but that they believed *Selby's* original account before the Commissioners, when he said it was not. It appears, that in the course of the trial a written guarantee, with Mrs. *Johnson's* name attached to it, was produced to strengthen the plaintiff's case, which purported to bear date on the 15th March 1825,—that is, just a month previous to the date of the note. But it is somewhat remarkable, that a piece of the paper, on which this document was written, was cut out just above the name of "*A. M. Johnson*," which appeared to be subscribed to it; and *Worrall* was the attesting witness to this guarantee. The jury, it seems, did not believe the account which *Worrall* gave of this document. If they had, the case would have been with the petitioner. But no satisfactory explanation was given to them of what had previously been written on the paper above the name of "*A. M. Johnson*." Are we then to say that the jury have done wrong in disbelieving *Worrall*? The petitioner, in asking for further investigation, has brought no new facts before us to induce us to send this matter again before a jury, and I own that I for one am satisfied with the verdict.

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Sir A. PELL.—The question in this case is a very simple one, namely, whether *Henry White* had any debt proveable under the commission. The Vice-Chancellor orders an issue to ascertain this fact, and directs that *Henry White* and the bankrupt shall be examined at

1882.

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WHITE.

the trial, and that the plaintiff and defendant shall be also at liberty to examine all those persons who made affidavits previous to the hearing of the original petition. Mrs. *Johnson*, the bankrupt, is put into the witness-box, but not *Henry White*; and the jury find a verdict against *Henry White*; and now, when he has lost the verdict, he applies to us for a new trial, in order, as he says, to bring better evidence before a jury, when he himself was the best witness in his own cause. There are no grounds whatever, in my opinion, for such an application; and I go this length, that if it had so happened that he had got the verdict, and not have tendered himself for examination at the trial, I should have been dissatisfied with such a verdict, as he had not submitted to be cross-examined by the other side. For what was the material point to be proved? It was, whether *Henry White* was an indorsee of the note for value received; and no one was so good a witness as himself to prove this fact. Have not the jury then drawn a right conclusion, when *Henry White*, the most important witness to explain this transaction, and who was expressly directed to be examined by the order of the Vice-Chancellor, avoids all explanation on the subject? I do not feel myself bound to express any opinion on the question, whether the money was paid, or not, before the note was signed by Mrs. *Johnson*. But the mode, in which the plaintiff's case was conducted at the trial, is very remarkable. A document, the most important that can be well conceived, to establish his right to recover in the action, is not produced in support of his original case, but is brought forth on the cross-examination of the bankrupt, for the purpose of invalidating her testimony. The motive is obvious—

this document appears to be mutilated in a material part; and if it had been put in in evidence originally, this mutilation must have been accounted for. But the counsel very ingeniously tried to save this inconvenience, and kept it back till he could use it, without exciting so much suspicion as to the genuineness of its fabrication. When I unite these two circumstances,—the not producing *Henry White* as a witness, and the keeping back of this most important paper, which ought to have been produced in the first instance,—I cannot help thinking that the plaintiff's counsel must have felt there was imminent danger in producing either. The Commissioners having declared the debt not proveable, the jury upon their oaths have said the same; the judge, too, has not expressed himself dissatisfied with the verdict; and I, for my part, can arrive at no other conclusion. When I consider, moreover, that this poor woman, for a share of 20%, is attempted to be rendered chargeable to the amount of 1000%, I feel myself happy in saying, that I see no reason whatever for disturbing this verdict.

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ERSKINE, C. J.—I omitted to state any thing relative to the consideration of this note. It appears to me, that there is nothing, in the circumstances of this case, to put *Henry White* in a better situation than *John White*; and I am not satisfied, that any consideration passed between the brothers at all.

Sir J. Cross.—The jury have carefully investigated the facts of this case by the *vivâ voce* testimony of the witnesses; and the direction of the Chief Justice to the jury was, that if they thought there was any evidence of collusion between the two *Whites*, Mrs. Johnson would have a good defence to any action on the note.

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The whole transaction appears, certainly, very like a scheme concerted between the two brothers to fix Mrs. *Johnson* with the amount of this note. But *Henry White* might have told his own story in the character of a witness. He shrunk, however, from that inquiry. I could not at first understand what connection *Selby* had with any of the parties to the note; but when he says that he collected signatures to the guarantee, as the agent of *J. White*, I own, it appears to me that there is a strange inconsistency in his statement. *J. White* had been improvident enough to hand over 1000*l.* to *Worrall* for the use of the mine; but had Mrs. *Johnson* any thing to do with that transaction? It is quite clear she had not; for she had no interest whatever in any of those transactions, beyond her 20*l.* share in the mine. It is more than probable, that *Selby* and *Worrall*, frequenting the house of this poor woman as customers, cajoled her to put her name to the note, after the money had passed from *J. White* to *Worrall*. If that was so, the note, as far as Mrs. *Johnson* is concerned, would be a mere *nudum pactum*; for it would be an *ex post facto* execution of an instrument requiring an additional stamp. I agree with my learned colleagues, that the jury in this case have arrived at a right conclusion, and that there is no ground whatever to disturb the verdict.

Sir G. Rose, having been formerly counsel in the cause, gave no opinion.

The Order made was, that the petition should be dismissed with costs, including the costs of the original petition, of the trial at law, and of this application.

The petitioner being dissatisfied with this judgment of the Court of Review, applied, under the provisions of the 1 & 2 *Will.* 4. c. 56. s. 31., for a special case by way of appeal to the Lord Chancellor. In the course of settling the special case, *Erskine*, C. J. entertained some doubts as to the correctness of his former decision; and wishing to have an opportunity of re-considering his judgment, it was agreed, that instead of prosecuting the appeal, the whole matter should come on again before the Court of Review, on a petition for re-hearing.

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The case was accordingly re-argued this day by Mr. *F. Kelly*, who with Mr. *Swanston* appeared on behalf of the petitioner *H. White*. He contended, that whether the money was advanced by *J. White* before or after the note was signed by Mrs. *Johnson*, she was liable for the amount, as one of the parties to a joint promissory note. Notwithstanding the case of *Clerk v. Blackstock* (a), it is not necessary to the validity of such a note, that all the makers should sign at the same time. If the note had been given originally by *Worrall* on his own account, and Mrs. *Johnson* had afterwards signed it as a surety, then it is admitted that the note would require an additional stamp. But in this case the instrument was not complete, until after Mrs. *Johnson* had signed it. Where it is part of the original bargain, that certain parties shall sign a note, they may sign it at any time subsequent to the date of it. And such appear to be the facts in this case; *Worrall*, the managing owner of the mine, having borrowed the money of *White*, for the use of the Company.

June 20, 1833.

(a) Holt N. P. Rep. 474.

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WHITE.

Mr. *Hutchinson* and Mr. *Wright*, contra. As to the first question put by Lord C. J. *Tindal*, in summing up to the jury on the trial, namely, whether Mrs. *Johnson* had signed the note before the money was advanced by *J. White*, the other side seem now to contend, that though the contrary was the case, yet under the circumstances of *Worrall's* promise to *J. White*, at the time he signed the note, it would not require an additional stamp. The only authority upon this subject is the case already cited of *Clerk v. Blackstock*, and that certainly does not bear out the proposition contended for. [Sir *J. Cross*. The only point, as I take it, that was decided by that case, is, that if there is a new contract after the date of the instrument, it then requires an additional stamp.] The facts of that case, however, do not apply to this. There *Blackstock's* name was mentioned at the time the note was given; but in this case *Johnson's* name was never mentioned by *Worrall* to *J. White*. Therefore *J. White* did not advance his money upon the credit of Mrs. *Johnson*, nor is there the slightest evidence of any application made by *Worrall* to her, previous to his obtaining the money from *J. White*; which is an essential point to render the note valid, as against Mrs. *Johnson*. [Sir *J. Cross*. It is clear, that the money was advanced to *Worrall* upon the credit of the signatures already subscribed to the note; and if other signatures were afterwards subscribed, were not these new contracts? *Worrall* does not pretend to any previous authority from the shareholders who subsequently signed the note, but says, "I will obtain their signatures."] *Worrall* was acting for his own benefit throughout this transaction, being himself a consi-

derable shareholder in the mine. It was therefore his interest to make other parties liable. And the whole of his statement, as to the subsequent signature of the note by Mrs. *Johnson*, is evidence of a new contract. But if there was a gross fraud practised upon Mrs. *Johnson*, there is an end of the case; for what was founded in fraud cannot constitute a legal debt. Mrs. *Johnson* expressly swears that she was never applied to concerning any advance of money, previous to *Selby* applying to her to sign the note; and that she was induced to sign it, by his assuring her that it was all a matter of form, and that she should never be called upon for a farthing.

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Cur. adv. vult.

There being a difference of opinion among the Judges,

Sir J. CROSS proceeded first to deliver his judgment. This claim was dismissed three years ago by the Commissioners, after three successive sittings. The Vice-Chancellor, on appeal, refused to allow it, unless the claimant could satisfy a jury of its validity, and gave him liberty to prove his claim, by his own testimony. The case went to a jury, nearly two years ago; and on the trial the claimant declined to give any evidence himself in support of it, but relied upon his other witnesses. The jury found a verdict against him. He then applied to this Court to set aside the verdict, but the three judges, by whom the case was heard, having fully considered the Lord Chief Justice's report, and the arguments of counsel, were unanimously of opinion, that the verdict ought not to be disturbed;

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and they dismissed his petition with costs. He has now for a whole year evaded the payment of those costs, and has preferred his petition for a rehearing, in the absence of the Chief Justice's report; though he still keeps out of the way, and the solicitor who has attested his signature to the petition, I understand, has sworn, that *he* does not know where to find him. It appears to me, that this new petition is preferred in contravention of several established rules. One is, that no petition for rehearing shall be allowed after the expiration of six months, unless some clear mistake or oversight has been discovered; and this comes after an interval of nearly twelve months. Another rule is, that no petition shall be allowed for costs only; yet this appears really to have no other object; for the assignees declare that there will be nothing to divide among the creditors, unless they recover the costs of these proceedings, pursuant to the order, which is now sought to be set aside. It is another general rule, that a petition for rehearing shall set forth the reasons for it, that the Court may be apprized of them before the argument, and be thus enabled to judge whether it be a fit case for rehearing. But in this petition no reason is adduced, no error in law or in fact assigned, no mistake or oversight suggested, nor any thing to that effect,—but merely the general allegation, that the facts established in evidence, and the law applicable thereto, entitle the petitioner to have his claim allowed; which amounts to no more than this, that the former judgment, in which the Commissioners, the jury, and the Court of Review have all concurred, ought to be reversed. The public must naturally suppose, that a

case so highly favoured involves a stake of no ordinary magnitude between the contending parties; and it will be heard with some surprise, that there is really nothing to contend for, but which of them shall pay the costs of this vexatious litigation, that has involved an unfortunate widow and her family in bankruptcy, and consumed the wreck of her little substance, which three years ago ought to have been divided amongst her creditors.

The whole of this case on the part of the claimant, to say the least of it, is a tissue of inconsistencies and contradictions; among which (with the exception of the promissory note) we find no written evidence, such as usually accompanies commercial transactions,—especially to so large an amount as 1000*l.*,—to guide us in search of truth. But the whole depends upon oral testimony, and upon the frail memory and questionable veracity of the witnesses, the principal of whom is *Selby*, the attesting witness to the note. And he, on two several examinations before the Commissioners, swore, on a vital point, to a certain state of facts; and yet afterwards, and when a legal objection has been founded upon that statement, and the matter went to a trial, he swore the direct reverse, and so as entirely to obviate the objection raised by his former evidence. He stated, too, on his first examination, that he kept a diary, which would show all the dates in question; but he has never yet thought proper to produce it. As little can *Worrall*, the next witness, be depended upon. He says, he borrowed and received the whole sum of 1000*l.* for the use of the shareholders, and expended it for their use in the mines. Yet he, the treasurer and secretary at that time, can produce no written account

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whatever of this transaction, saying, that he made none at the time, except with a pencil in his pocket book, which he has never produced, and about which he prevaricated not a little on the trial, when he stated this entry to have been made in no less than three different places. Yet there was a parade of several witnesses from the Bank of England, and other places, to trace the money from *J. White*, the lender, through *Worrall*, to the mine. But the whole of their evidence amounts to this, that *White* had 1000*l.* at that time at his disposal, that *Worrall* got 500*l.* of it, that he exchanged 150*l.*, part thereof, for three bank post bills payable to himself, which were produced and had the indorsement of one *Coombe*, who was said to be a manager at the mines. But whether one shilling of the money was ever applied to any purchase or payment, for which *Mrs. Johnson* was answerable, does not appear. This 150*l.* in bank post bills is all that there was any colour for tracing to the mines, in confirmation of *Worrall's* testimony. And this witness, although he got the whole 1000*l.* eight years ago, on a credit of four months only, has never been yet applied to for payment. He became bankrupt in the following year, 1826, and got his certificate, without this debt being proved under his commission. *J. White*, the lender of the money, and the indorser of the note, was another witness to prove this debt for his brother, the holder, to whom he swore he was indebted to that amount. He says, also, that he got his discharge as an insolvent debtor in 1827, two years after the note became due, yet he did not insert this debt in his schedule, nor has he ever before or since been applied to for payment. *Mr. Nichols*, the solicitor for this petition, with whom *Selby* was a clerk

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when he drew the note, was another witness. He says, it was put into his hands by the present holder, before it became due; but for what purpose he does not state, and one is at a loss to conjecture, unless to enforce immediate payment. He did not, however, apply to the indorser, or to any of the ten makers of the note, for payment of this large debt when it became due. But in about three months afterwards, he says, he wrote a letter to Mrs. *Johnson*, to which he does not say he received any answer, nor, indeed, did he offer any legal evidence of such letter. In twelve months afterwards, he added, he again applied to her alone, for payment, before he had applied to any of the other subscribers, telling her at the same time, that he did not intend to sue her, as she was a widow with a family. He has since sued two others, and obtained part payment from them, but has never yet applied to any of the other parties. Mrs. *Johnson* was then called as a witness on the other side; she admitted her signature to the note,—she said, she had taken a 20 $\frac{1}{2}$. share in a mine from *Worrall* a short time before; that he, and *Selby*, and one *Stafford*, applied to her to sign the note, assuring her at the same time, it was only a form and for a temporary purpose, and she would never be called upon for payment. Her story is confirmed to a certain extent by *Selby* and *Worrall*; but they say, they only held out to her a *hope*, and not a *promise*, that she should never be called upon for payment. But it derives still stronger confirmation, from the fact of forbearance to apply to any party for the payment, either of the principal or interest, till after *Worrall* had got his certificate, and *White* his discharge as an insolvent debtor. And it derives still further confirmation, from

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the facts disclosed by them on the trial; from which it appears, that about the time the note was drawn, that is, in April 1825, *Worrall* and *White* were already deeply involved together in pecuniary transactions. *White* had discounted bills to a large amount for *Worrall* and *Stafford*, (one of the three persons who, Mrs. *Johnson* says, prevailed on her to sign the note,) and some of those bills were then dishonoured, and others were to be provided for. *Worrall* had then offered to transfer certain shares in the same mine to *White*, who was not, however, at that time prepared to accept them; and *Worrall* was then also largely interested in another mine, a tin mine, and he was also in trade as a spirit dealer; so that he had many other purposes, for which, to the knowledge of *J. White*, he might have had urgent occasion for the money in question. And when at the end of four months the note became due, *White* and *Worrall* went down into Cornwall, and certain shares, the number or estimated value of which they have not stated, were then transferred from *Worrall* to *White*, and, for any thing that appears to the contrary, may have been a full equivalent, and as such received in payment, for the 1000*l.* note. This appears to me the probable solution of the whole case; either that the debt was settled between those two, at the time it became due,—or else that *J. White* has fraudulently concealed it from his assignees; to whom, if it be an unsatisfied note, it passed by his assignment; and the two *Whites* are, in that case, conspiring together to defraud the assignees of the insolvent debtor. For it is not now pretended, that *H. White*, the petitioner, is the *boná fide* holder of the note; nor does it appear that he is endeavouring to

prove it in lieu of his brother, for any other purpose than in furtherance of such conspiracy and fraudulent concealment. But, be this as it may, with such witnesses and such testimony, there is no hope of a more satisfactory result from a new trial.

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It has been contended, that the Lord Chief Justice left a point to the jury without any evidence to support it. I cannot believe that of the learned Judge who tried this cause, or that the counsel would silently submit to it on the trial, and afterwards, too, on the former motion to set aside the verdict.

The jury found, that the petitioner, *H. White*, had no debt proveable under this commission, and I entirely agree with them. I agree with the Lord Chief Justice before whom the issue was tried,—I agree with the Commissioners who rejected the proof,—I agree with the Vice-Chancellor, and with the counsel on both sides, that this was a proper case to be tried by a jury,—and I agree with the Court of Review, who unanimously dismissed the former petition with costs. But even if I could believe that the note was a valid and still unsatisfied security, constituting a debt owing to the assignees of *J. White*, I think it would be repugnant to every principle of justice, and a sanction of perjury, to allow his brother, the petitioner, a mere fraudulent holder, to swear that the bankrupt is indebted to him upon and by virtue of that note.

For these reasons I am of opinion, that this new petition, which calls upon us to direct a new trial, or submit a case for the opinion of a Court of Law, ought to be dismissed with costs.

I have, on former occasions, felt it to be my duty to observe, that although this Court is constituted by act

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of parliament a Court both of *law* and *equity*, and of peculiar, if not exclusive jurisdiction, in these matters, that it is not always so considered by the bar. And I must suppose, that this circumstance was forgotten by the learned counsel, who have signed this petition, when they called upon us to submit a case for the opinion of a Court of Law.

ERSKINE, C. J.—When this case came originally before the Court, after it had been submitted to a jury by the direction of the Vice-Chancellor, I was of opinion that no new trial ought to be granted. The parties, however, were not satisfied with the decision of the Court of Review, and called upon us to state a special case for the opinion of the Lord Chancellor. It fell to my lot to settle that case; and being on that occasion obliged to look more attentively into all the circumstances relating to the point in issue between these parties, I confess I felt very doubtful of the correctness of my former opinion; and it was on the communication of these doubts of mine, that the parties suggested a rehearing of the petition. If there has been, therefore, any breach of the rules relating to the practice of this Court, I must plead guilty, as a party concerned. But it appears to me, that it cannot justly be said that those rules have in this instance been broken in upon. The principle of the rule, which limits the period of six months for presenting a petition for rehearing, is, that a party shall not quietly lie by for all that time, and give the other party reason to suppose that he acquiesces in the decision of the Court. But here there was no delay of that description; for the petitioner, long before six months elapsed, applied

for a special case. Then with respect to the rule, that no petition for rehearing shall be allowed for costs only, I take the principle of that rule to be this—that where a case has been heard and decided on the merits, and costs given to either party, the order that has been pronounced by the Court is not to be opened by the other party, on the mere ground of the costs being given against him. But when an erroneous decision on the merits may have been come to by the Court, that has the effect of saddling a party with costs, I conceive, that there is then no objection that the order should be reconsidered, notwithstanding any alteration of it may involve the liability of either party for the costs. (His Honour then, after recapitulating the facts of the case, which have been already fully stated, proceeded as follows:)—The circumstance of the petitioner omitting to prove any valuable consideration given by him for the promissory note, it must be admitted, lets in the whole question as to the original construction of it. But all the evidence that was necessary for the petitioner to adduce in the first instance, was the production of the note, and the proof of the handwriting of Mrs. *Johnson*, one of the makers of it, and of the indorsement of *John White*, the payee. But the petitioner did more—for he proved a final judgment in an action brought by him against Mrs. *Johnson* on this very note, after she had pleaded in that action a plea of a judgment recovered; which every one knows amounts to a sort of admission of the debt. It was then, however, attempted to be set up by the assignees, in their defence, that the note was obtained from Mrs. *Johnson* by fraud, and that it was all a fiction that the money was borrowed for the purposes of the mine,—or, even if it was, that she was

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not answerable. But she admits that she signed the note, upon the understanding that it was for money advanced for the mine; and any misrepresentation that might have been practised to induce her to sign the note, must be brought home to *J. White*, in whose favour it was made payable. Mrs. *Johnson*'s evidence on this subject at the trial was, "They said, I should never be called upon for a farthing." Now who were the persons meant by the expression "they"? No others but *Worrall*, *Selby*, and *Stafford*, who were all three interested in the mine. *John White* was in no way whatever privy to any thing that passed on this occasion. Mrs. *Johnson* signed the note, in the full assurance that it was for money borrowed for the purposes of the mine. But it is said, that because further evidence might have been adduced by the petitioner at the trial, to show the application of the money for which the note was given, the Court would not be justified, on his application, in granting a new trial. Lord C. J. *Tindal*, in summing up to the jury, says, "There can be no doubt that the money was advanced by *John White*, the payee." But he left to their consideration two other points: 1. Whether the note was signed by Mrs. *Johnson* after the money was advanced by *John White* to *Worrall*: and 2. Whether *Henry White* had given any consideration for it. The first of these questions involved the point, whether the note did not require two stamps upon it. Now I am sure, that if that had been a main point contested by the assignees, when the case was before the Vice-Chancellor, he would not have sent the case for a trial. But with regard to this point, I think there was not sufficient evidence to enable the jury to decide, whether the note was signed by Mrs. *Johnson* before, or after,

the money was advanced to *Worrall*. I entirely concur with the Lord Chief Justice in every thing he said to the jury. He said that if Mrs. *Johnson* was told, before she signed the note, that the money was to be borrowed of *John White* for the purposes of the mine, and she then promised to sign it, the note would in that case not require another stamp; notwithstanding she might have signed it after the money was advanced, and after it had been signed by *Worrall*. As this Court is now to come to a final judgment of the case, I think the right conclusion under all the circumstances is, to admit the proof of the petitioner; because I find no evidence that goes to contradict his rights as the indorsee of this promissory note. And I think, that *Selby's* evidence before the Commissioners was not sufficient to justify them in rejecting the proof. But then it is said, that no consideration was given for the note by the petitioner to *John White*, the payee. Now this question was never raised before the Commissioners, before the jury at the trial, or before this Court on the former hearing of the petition for a new trial. But whether or not *Henry White* gave the consideration for the note, which *John White* says he did, that forms no part of the question now before the Court. If indeed the assignees could prove, that *John White*, the payee, had given no consideration for it, then that might be of some avail; but the assignees have not been able to disprove that fact. Then it is said, that *John White* took the benefit of the Insolvent Act, and omitted to insert any mention of this note in his schedule. But no possible injustice can be done to his creditors, by admitting the proof of *Henry White* upon the note, if notice is given of that

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fact to *John White's* assignees. Upon a reconsideration then, of the whole of this case, I am not ashamed to own I was wrong in the opinion I formerly expressed; and I am now satisfied, that the promissory note constituted a debt proveable by *Henry White* under this commission.

Sir G. ROSE concurred with the Chief Judge; but having been formerly counsel in the cause, abstained from delivering any judgment.

The Order finally made was, that the Order of the 10th July 1832, and the consequential Orders made thereon, should be reversed; and that the petitioner was entitled to be admitted a creditor for the balance, if any, due on the promissory note; that the dividends should be paid into Court in the name of the petitioner, with liberty for either party to apply; the costs of the assignees to be paid out of the estate,—but no other costs given; and that notice of the proof should be given to the assignees of the insolvent, *John White*.

Southampton
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July 10, 1832.

Where an equitable mortgagee is also an assignee, a solicitor will be appointed to take the account, and conduct the sale.

Ex parte LEES.—In the matter of CORLESS.

THIS was the petition of an equitable mortgagee of a policy of assurance effected by the bankrupt on his own life, the petitioner having been also appointed assignee under the commission. Under these circumstances, the prayer was for a sale of the policy, with leave to bid at the sale; and that a solicitor should be

appointed by the Commissioners to take the account of what was due to the petitioner, and to conduct the sale on behalf of the general creditors of the bankrupt.

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Mr. *K. Parker* appeared in support of the petition, and said that the prayer of it was framed pursuant to an order made by Sir *Anthony Hart*, when Vice-Chancellor, under the like circumstances, in the case of *Ex parte Cowdry (a)*, where the party applying for a sale was both mortgagee and assignee.

The Court, on referring to that case, made the Order as prayed.

(a) 2 G. & J. 272.

Ex parte PEPPIN.—In the matter of WRIGHT.

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MR. *TEED* applied to the Court for an order, that service of a petition to annul a fiat, at the place of residence of the petitioning creditor, as the same was described in his affidavit of debt on striking the docket, might be deemed good service. The application was founded, on an affidavit that inquiries had already been made at the place of abode of the petitioning creditor mentioned in his affidavit of debt, and also at the office of the solicitor who sued out the commission, without any information being obtained respecting him, and that the deponent believed he kept out of the way to avoid service.

Special service of a petition to annul a fiat directed, where the petitioning creditor is not to be met with.

The COURT made the Order as prayed, directing also, that a copy of the petition should be served at the office of the solicitor who issued the commission.

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Ex parte BAKER.—In the matter of SILL.

After a fiat had issued, the bankrupt makes certain proposals to his creditors, to prevent the prosecution of it; to which proposals the solicitor for one of the creditors promises to give an answer, at a certain time, on the following day, (the 16th after the date of the fiat;) but before that time arrives, he strikes a second docket, for non-prosecution of the first, under the General Order:—*Held*, that this was a breach of faith, and a petition to annul the first fiat was dismissed with costs.

An affidavit, though not filed, may be read, upon an undertaking to file it.

THIS was the petition of a creditor who had sued out a second fiat against the bankrupt, for want of the prosecution of the first within the time limited by the General Order (*a*), praying that the first might be superseded. It appeared, that the first fiat was issued on the 19th June, and that on the 4th July, which was a day after the 14 days expired for the prosecution of it, the petitioner struck a second docket, and applied at the office for a supersedeas, pursuant to the terms of the General Order; but the Bankrupt Office refused to supersede, on the ground that the petitioner had notice that the first fiat was to be proceeded with. The fact was, that after the first fiat issued, some negotiation with the bankrupt had been pending, for an arrangement with his creditors, without the necessity of making him a bankrupt; and on the 3d July the terms of the proposed arrangement were communicated to the petitioner, and his solicitor, Mr. *Gresham*, for their approbation; when the latter said, that he would give an answer on the morrow by half-past four o'clock. At ten o'clock, however, in the morning of that day, Mr. *Gresham*, without waiting for the time when he had promised to give an answer, went to the office and struck the second docket. The petitioning creditor proceeded, nevertheless, with the first fiat, and obtained an adjudication under it, the Commissioner being wholly ignorant of the delay that had taken place in working it, and of the circumstance that a second fiat had issued against the same party.

(*a*) 26th June 1793.

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Mr. *Montagu* and Mr. *G. Richards*, in support of the petition, contended, that as the time for the prosecution of the first fiat expired on the 3d July, and the petitioner did not apply for a supersedeas until the 4th, the Bankrupt Office was then bound, upon his application, to issue an order for a supersedeas, pursuant to the terms of Lord *Loughborough's* General Order; which directs, that the application for a supersedeas and for a new commission, which shall in the course of the first day after the expiration of 14 days from the date of the first commission, be first made by any other attorney, than the attorney at whose instance the first commission was issued, shall be preferred to an application for the same purpose by the attorney who sued out the supersedable commission. The question is, whether the officers at the Bankrupt Office are to comply with the requisitions of the General Order, or whether it is to be erased from the books. If the petitioning creditor was not prepared to open the first fiat in due time, it was his duty to have applied to this Court to enlarge the time for that purpose; when the Court would have granted him an order, if he had any special circumstances to state that justified the delay: *Ex parte Moody* (a). But where the petitioning creditor wilfully delays the prosecution of a fiat, it will be superseded; and this, notwithstanding the delay may have been occasioned by the request of the bankrupt, and may have been with the concurrence of the creditors: *Ex parte Luke* (b).

Mr. *Bligh* and Mr. *Swanston*, for the respondents. A fiat is not *ipso facto* superseded, but only superseded-

(a) 1 Deac. & C. 34.

(b) 1 G. & J. 361.

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able, for want of prosecution at the expiration of 14 days after its date. The question is, what is meant by the term "want of prosecution," which is the language used in Lord *Loughborough's* Order. This can only be gathered by the adjudged cases. Now in some instances the Court has permitted a petitioning creditor, after the expiration of the 14 days from the date of the commission, and even after the commission has been actually superseded, to prosecute the first commission, where there has been a *bonâ fide* intention to proceed with it: *Ex parte Freeman* (a). So in *Ex parte Ellis* (b), where the time for the adjudication had expired, and the first commission had been regularly superseded for want of prosecution, the Lord Chancellor ordered the supersedeas to be quashed, and the first commission to be revived, as there was a *bonâ fide* intention to prosecute it. In *Ex parte Leicester* (c), also, it was held by Lord *Eldon*, that a commission was not actually superseded till the writ of supersedeas issued,—and therefore that a commission having been opened, and the bankruptcy adjudged, after an order made for the supersedeas, but before the writ was sealed, the commission was supported. And the same doctrine was held in *Ex parte Layton*, and *Ex parte Hardwicke* (d), which were cases occurring in the same bankruptcy. In the case now before the Court there has been only a delay of one day, which is attributable to the party who struck the second docket; for it arose entirely from his breach of faith: and we have, moreover, an adjudication of the Commissioner under the first fiat. [Sir *G. Rose*. It appears to me, your case is a very short

(a) 1 Rose, 380.

(b) 7 Ves. 135.

(c) 6 Ves. 429.

(d) 6 Ves. 434.

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one,—you get the adjudication under the first fiat, before the other party obtains the supersedeas. *Erskine*, C. J. The case against you is, that on the 4th July the petition to supersede was in the office, when, according to the terms of the General Order, it was competent to any creditor to supersede, as a matter of course.] But here we were actually prevented by the other party from opening the first fiat within the required time; and this is a good ground for preferring the first fiat to the second; notwithstanding the Court has in one case refused to grant further time to a petitioning creditor to open a fiat, merely because the delay proceeded from a negotiation with the general body of the creditors: *Ex parte Downton* (a). The case of *Ex parte Luke*, that has been cited by the other side, has no application to the case before the Court; for there was no contest there which of two commissions should be preferred, but the petitioning creditor had been guilty of a delay of nine months in prosecuting the commission, and had sued it out for the purpose of overreaching the execution of a judgment creditor. [Sir J. Cross. The doubt in my mind is here, whether your adjudication can be strictly supported, on the ground of its having taken place *pendente lite*; for they applied in time for a supersedeas at the office, and were only delayed by the act of the officer.] The application was made at the office by Mr. Gresham before the time he had appointed to give an answer, whether or not he would accede to the arrangements that were proposed to be made with the bankrupt,—and we have an affidavit of the solicitor who sued out the first fiat, that it was his *bonâ fide* inten-

(a) 1 Deac. & C. 111.

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tion to proceed with it; and that the delay arose entirely from waiting for Mr. *Gresham's* answer, who omitted to give any notice of his intention to strike another docket.

Mr. *Montagu*, in reply, was proceeding to read some affidavits that had not been filed; which being objected to by the other side, [Sir *G. Rose* observed, it might be done, upon his undertaking to file them. But in regard to the prayer of the petition, he wished to know, whether any case could be found, which decided that a first commission was ever superseded for want of prosecution under Lord *Loughborough's* General Order, where there was an actual adjudication under it before the writ of *supersedeas* was sealed. All the cases are the other way; the second commission having been frequently superseded, to give effect to the first.] Is it consistent with the meaning of the General Order, that a petitioning creditor may let the whole 14 days elapse for working a fiat, and then, notwithstanding there may be applications from numerous solicitors for another fiat, that he is to be at liberty to get an adjudication on the morning of the 16th day after the date of the fiat? I contend, that any other creditor might have struck a docket in the morning of the 15th day, and therefore that Mr. *Gresham* was fully justified in doing so.

ERSKINE, C. J.—If this petition had been resisted, on the mere circumstance of the adjudication under the first fiat having been obtained before the writ of *supersedeas* was actually sealed, notwithstanding the previous application at the office for the writ by the peti-

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tioner,—I own I should have had some difficulty in saying, that that alone was a sufficient reason to prefer the first fiat to the second. But as the practice has been stated to be so by one of the members of the bench, curtesy has prevented me from interposing during the argument to express my own opinion on that subject. It must be remembered, however, that the petitioner in this case, besides charging the other party with the neglect to prosecute the fiat within the time limited by the General Order, goes on to allege, that the first fiat was taken out for the purpose of effecting a composition between the bankrupt and his creditors, and for other purposes than those recognized by law. But when a petition is presented to supersede a fiat already in operation, on the ground that it was taken out for an improper object, the petitioner must not only prove the truth of his allegations against the other party, but he must also show, that he himself is clear from any imputation of blame. It does not, however, appear to me that such was the case on the part of the solicitor for this petition. For on the 3d July,—when certain proposals were made to him by the solicitor who issued the first fiat, to come to some arrangement with the bankrupt, instead of prosecuting the fiat,—he said, “I will give you an answer to-morrow by half-past four;” and then, before waiting for that time, he steps in and strikes a fresh docket; which was nothing less than a gross breach of faith to the solicitor who had issued the first fiat. Upon these grounds, therefore, and because the delay in prosecuting that fiat was acquiesced in by the solicitor for the petitioner, I think that this petition should be dismissed with costs.

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Sir A. PELL.—I think this case does not depend upon the construction we may be disposed to give to Lord *Loughborough's* order; but on various matters of fact. Nor does it appear to me, that the practice in bankruptcy has been so established heretofore, as to prevent us from deciding on this petition according to the equity of the case. And this depends upon a few simple facts. (His Honour then entered into a detail of the correspondence that took place between the solicitor, who issued the first fiat, and Mr. *Baker*, the petitioner, on the subject of the proposed arrangement between the bankrupt and his creditors.) This state of things continued down to the 3d of July, when Mr. *Baker* declined acceding to any arrangement, until he had seen Mr. *Gresham*, who promised to give an answer at half-past four the following day. Mr. *Gresham*, however, deemed it expedient for the interests of his client to strike a docket before that time arrived. Now, under these circumstances, had a supersedeas actually issued, and an application been made to revive the first fiat, I should have thought that such an application ought to have been granted. And as the case now stands, I think that the first fiat was sued out *bonâ fide*, and that the petitioning creditor was diverted from proceeding with it by waiting for the time that Mr. *Gresham* had appointed to give his answer, whether he would advise Mr. *Baker* to accede to the proposed arrangement; and I cannot help saying, that I think it was a breach of faith in Mr. *Gresham* to go and strike a docket before that time arrived.

Sir J. CROSS.—A fiat is not *ipso facto superseded*, but merely *supersedable*, for want of prosecution within

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England she authorized “ *Henry Wilton* of Tunbridge Place, in the county of Kent,” to sign any petition to the Lord Chancellor on her behalf in this bankruptcy.

Mr. *Montagu* (Mr. *Swanston* and Mr. *Wright* were with him) now moved that this order might be discharged, as it was obtained on an affidavit which was improperly sworn,—the 6 G. 4. c. 16. s. 46. requiring that when a creditor is out of England, the affidavit must be attested by a notary public, British minister, or consul; neither of which had been done in the present instance. In *Ex parte Moens* (a) it was decided, that although an affidavit had been sworn before the British consul at Rio de Janeiro, it could not be received, as it was not attested by a notary. The affidavit in this case therefore was not readable, for the same defect, and the order which proceeded on it must be set aside.

Sir A. PELL.—The description, too, in the affidavit of Mr. *Wilton*, would be held to be no description at all in other cases.

Sir G. ROSE.—The party, being out of the country, wanted no special order of the Court to permit her agent to sign this petition on her behalf. In all such cases any authorized agent may sign a petition for his principal, under the General Order (b).

Mr. *G. Richards*, in support of the order, cited a case, *in re Boldero* (c), where an order was obtained for

(a) 1 Mont. 15. (b) 12 August 1809. And see 1 Deac. B. L. 837.

(c) 1 Rose, 231.


agents in town to sign a petition for their principals, who were resident at York. [Sir *G. Rose*. The principals there were resident in England, but this is quite a different case. The order that has been made is quite irregular. Sir *A. Pell*. Your authority was given you in March 1829, to petition the Lord Chancellor; and the question is, whether you can now petition this Court.] The whole question really is, whether Mr. *Wilton* alone is a sufficient security for the costs of the petition, and I contend that his security is quite sufficient.

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ERSKINE, C. J.—If you had proceeded in the regular way, Mr. *Wilton* might have signed the petition for Mrs. *Moore*, under the provisions of the General Order; and then, if they had objected to his security, the question might have been settled before the proper officer of the Court. But we think that, under all the circumstances, the order has been improperly obtained, and must be rescinded with costs.

Mr. *Wakefield*, who appeared for the petitioning creditor, said, that he was necessarily made a party to this petition; and prayed therefore that the costs of his appearance might be paid out of the estate, and that the estate might be afterwards reimbursed by Mr. *Wilton*; which was ordered accordingly.



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Buildings,
July 17.

Where a bankrupt petitions to supersede, and brings an action at the same time to dispute the bankruptcy, the Court declined compelling him to elect which proceeding he would continue, but ordered that the petition should stand over, until the result of the action was known.

Ex parte CHAMBERS.—In the matter of CHAMBERS.

THE bankrupt in this case had petitioned to supersede the commission, and had also brought an action in the Exchequer, to dispute the act of bankruptcy. The petition and the action were both pending.

Mr. *Montagu* (with whom were Mr. *Swanston* and Mr. *Wright*) now moved, on behalf of the assignees, that the petitioner might be put to his election, either to abandon his petition, or to stay proceedings in the action at law; and cited *Ex parte Price* (a), and *Ex parte Burgess* (b), in support of the application.

Mr. *Whitmarsh* and Mr. *Girdlestone* opposed the motion.

The COURT ordered, that the petition should stand over until the result of the action was known.

Mr. *Swanston* contended, that the petitioner should be at once ordered to *elect* which mode of proceeding he would adopt; because that would operate as a final abandonment of the other course of proceeding.

Sir A. PELL.—Has not a man a right to institute proceedings in any of the Courts he likes? All that can be done is to stay proceedings in one Court, until those in the other are disposed of.

Mr. *Wakefield* appeared for the petitioning creditor.

Costs ordered to be reserved (c).

(a) Buck, 230.

(b) Jacob, 559.

(c) And see *Ex parte Price*, Buck, 230, 3 Madd. 228; *Ex parte Billiald*, Buck, 220.

1832.

Ex parte HATTERSLEY.—In the matter of CORLASS.

Southampton
Buildings,
July 18.

IT was a petition of the petitioning creditor, praying that the assignees might be ordered to pay to him costs, which he had paid for prosecuting the fiat up to the choice of assignees.

Petitioning creditor's bill ordered to be taxed by an officer of the Court, when objectionable charges have been allowed by the Commissioners.

Mr. Bichner appeared in support of the petition.

Mr. Swanston, who appeared for the assignees, said, the reason they had not paid the bill was, that there were several objectionable charges in it, which had been improperly allowed by the Commissioners,—as a charge for a bargain and sale, for a provisional assignment, and for an adjourned meeting to meet the bankruptcy, for neither of which was there slightest necessity. It is a sufficient objection to the bill of the petitioning creditor, that the commissioners have allowed charges in it, which ought to be disallowed; *Ex parte Thelwall* (a).

The COURT ordered it to be referred to one of the Deputy Registrars to tax the bill, and if the assignees should deny assets, or refuse to pay the bill after such taxation, then to take an account of the assets. Costs to be reserved.

(a) 1 Rose, 397.

1892.

Southampton
Buildings,
July 18.

Where a fiat is annulled after adjudication, for an insufficient act of bankruptcy, it is always at the cost of the petitioning creditor.

Ex parte FLETCHER.—In the matter of **FLETCHER (a)**.

THIS was a petition of the bankrupt, praying that the adjudication of bankruptcy might be reversed, and the fiat annulled, with costs to be paid by the petitioning creditor.

Mr. Temple, and *Mr. Swanston*, appeared in support of the petition.

Mr. Wigram, and *Mr. K. Parker*, on behalf of the petitioning creditor, consented to an order pursuant to the prayer of the petition, except with regard to the costs.

Sir G. Rose.—I never knew an instance of the commission being superseded, on account of a failure in the petitioning creditor to prove the requisites to support it, where the party who took it out was not adjudged to pay the costs. There may be some reason why the bond should not be assigned; but the party failing to prove the bankruptcy always pays the costs.

Mr. Wigram stated, that there were in this case strong circumstances of suspicion, that the bankrupt kept the witnesses out of the way, who could have proved the act of bankruptcy.

ERSKINE, C. J.—That would have been a good ground for applying to the Court for further time to open the fiat, or to postpone the adjudication; but as

(a) See other proceedings in the same matter, *ante*, 90, 317, 327.

you have thought proper to proceed to adjudication, without proving a sufficient act of bankruptcy, we can only reverse it, with costs.

1832.

Ex parte
FLETCHER.

Order made as prayed.

Ex parte BRAMSTON.—In the matter of CRICKETT (*a*).

Southampton
Buildings,
July 18 and 25.

THIS was a petition of the general assignees for the removal of an official assignee, who had been recently appointed under a commission, which issued on the 24th December 1825. The grounds of the application were, that there was no necessity for the appointment,—that not a single creditor had made any complaint against the assignees chosen under the commission,—that there would be a great expense imposed on the estate by the appointment, inasmuch as the debts proved under the commission amounted to 138,000*l.*, and the official assignee, under the 27th Rule (*b*) for regulating the practice of this Court, would be entitled to 2½ per cent. upon the amount of any dividend upon that sum,—and that there would be great inconvenience and expense in removing the books of the bankrupt from Chelmsford, where they were at present in the custody of the assignees chosen by the creditors.

Although the Court has a controlling power in the appointment of an official assignee by the Commissioner, yet the Court will not interfere, unless the Commissioner has exercised an unsound discretion in the appointment.

Mr. *Swanston*, in support of the petition, referred to the 19th Rule (*c*) for regulating the practice of the Court, which recommends, that no official assignee

(*a*) And see *Ex parte Parker*, 1 Deac. & C. 530; which was an order made on a motion relating to this petition.

(*b*) See 1 Deac. & C. App. p. xxviii.

(*c*) Ibid. p. xxvi.

1832.
—
Ex parte
BRAMSTON.

shall be appointed by any Commissioner, under commissions opened before the establishment of this Court, unless there appeared good cause for so doing.

Sir G. ROSE.—There appears to be no difficulty in restraining the official assignee from acting; but I do not think it would be right to annul the appointment.

Sir A. PELL.—I think we ought not to set aside the appointment of any official assignee, without consulting the Commissioner, and inquiring his reason for making the appointment.

ERSKINE, C. J. suggested, that the order for the appointment should be suspended, and the petition stand over for a week, to give the Court an opportunity of conferring with the Commissioner on the subject.

July 25.

Mr. *Swanston* was accordingly heard this day again in support of the petition. It is quite unreasonable, that in this case any official assignee should be appointed to derive emolument from those, who experience no advantage from the appointment. The accounts of the assignees have been duly audited during the progress of the commission, the last audit being the 10th January last; and 1500*l.* is shortly expected to be received, when there will be another audit. As the Court has published an order, recommending the Commissioner not to appoint an official assignee under a commission opened previously to the operation of the Bankruptcy Court Act, without an actual necessity, I now apply for the benefit of that order; for, in this case, the appointment of an official assignee is not asked by

any one person interested in the appointment, but is, on the contrary, disclaimed by them all. If the Court, however, should think proper to sanction the appointment, there should be some qualification in the order, as to the transfer of the documents relating to this bankruptcy from the elected assignees to the official assignee, so far as to prevent the vouchers and receipts of the creditors' assignees from being delivered up to the official assignee. Nor ought the official assignee to be permitted to interfere with any dividends already declared; for the order of dividend operates as an actual transfer of the amount of the dividend to every creditor; as where the money to pay the dividend is lying at a banker's, it becomes, after the dividend is declared, the property of the creditors, and not of the assignees; *Wackerbath v. Powell* (a).

1832.

Ex parte
BRAMSTON.

ERSKINE, C. J.—The act of parliament (b), under which the Commissioner has in this instance proceeded, declares that it shall be lawful for each Commissioner, who shall thenceforth act in any commission of bankrupt depending in the Court of Commissioners of Bankrupts in the city of London, at his discretion to appoint an official assignee to act with the existing assignees, if any, under such commission, and to direct the existing assignees to pay and deliver over to such official assignee all monies, books, papers, and effects whatsoever, in their possession or custody, as such assignees. An early section (c) of this act gives this Court a general superintendence and control in all matters of bankruptcy, and therefore we are certainly authorized to see that the discretion of the Commis-

(a) *Buck*, 495.

(b) 1 & 2 W. 4. c. 56. s. 40.

(c) Section 2.

1832.

**Ex parte
BRANSTON.**

sioner is not improperly exercised. But it is at the same time incumbent on this Court to exercise its own controlling power with the greatest caution, and to take care that no injury should accrue to the bankrupt's estate from any needless interference on our part. On the present occasion, I cannot say that the Commissioner has exercised an unsound discretion in the appointment of an official assignee, or in the order he has issued for the removal of the bankrupt's books from the custody of the elected assignees. The removal of the books, however, should cause no additional expense to the estate; and the Commissioner, when he knows the opinion of the Court on this point, will take care that no unnecessary expense is incurred by such removal.

Sir A. PELL.—If I thought that any additional and needless expense would be incurred to the creditors, by this appointment, I should unquestionably have expressed my disapprobation of it. But I should feel very reluctant to a hasty interference in removing an assignee, who has been appointed advisedly by the Commissioner.

Sir J. CROSS.—The legislature has trusted the appointment of the official assignee to the discretion of the Commissioner; and the question is here, whether he has exercised an unsound discretion. It is said, that no creditor has joined in any wish for the appointment; but that is no proof of any unsound discretion in the Commissioner. It appears, that the accounts in this bankruptcy have not been finally wound up, although seven years have elapsed since the issuing of the commission. Then, without imputing any negli-

gence to the assignees, this affords, at least, a good reason for some vigilance. It appears, also, that the assignees canvassed no less than 400 creditors of the bankrupt, to sign a remonstrance to the Commissioner, against the appointment. This is a very extraordinary proceeding on their part; and is, with me, a sufficient reason why the official assignee should not be removed. Where debts are proved against a bankrupt, as in this case, to the amount of 138,000*l.*, there may be several creditors who are bill-holders, and who by obtaining dividends from other quarters, may be now receiving more than 20*s.* in the pound. It seems to me, therefore, that the Commissioner had, under all the circumstances, good cause for making this appointment; nor am I able to surmise any satisfactory reason, why the official assignee should be removed. If the assignees are anxious for a final dividend, they ought rather to rejoice in, than object to, the appointment.

1832.

Ex parte
BRAMSTON.

Sir G. ROSE concurring,

The petition was dismissed.

Ex parte FEDDEN.—In the matter of BISSIN and another.

Southampton
Buildings,
July 18.

THIS was a petition of an assignee, praying that certain unclaimed dividends, which had been declared under the joint and separate estates, might, under the provisions of the 6 G. 4. c. 16. s. 110, be distributed

The Court will not order unclaimed dividends to be distributed among the creditors, unless the creditors, on whose

debts they are payable, have ample notice that they have been declared; and more especially, when a long period has elapsed before any dividend has been made.

Semble: that the unclaimed dividends of joint creditors can only go to the joint creditors, and those of separate creditors to the separate creditors.

1832.

Ex parte
FEDDEN.

equally among the general creditors; and that the assignee might have the costs of the petition out of the estate. The commission issued so far back as the year 1808, but 21 years elapsed before any dividend was declared; and there had been no final dividend declared under the joint estate. The certificate,—which is directed by the act to be filed by the assignees in the bankrupt office, within two calendar months after the expiration of one year from the declaration of the dividend,—was in this case filed by the assignee a twelve-month later than it ought to have been.

Mr. *Coleridge*, for the petitioner, said, that the question was here, whether the act of parliament does not treat unclaimed dividends as forfeited property, and give the Court a power of dividing them among the general creditors of the bankrupts, not confining the division to that particular estate under which the dividends were declared.

ERSKINE, C. J.—I entertain some difficulty, whether these dividends can be so distributed. I am inclined to think that the unclaimed dividends of the joint creditors can only go to the joint creditors, and not the unclaimed dividends of the separate creditors. There is no doubt that the Court has the power, from the words of the act, to order the distribution before a final dividend. But, in this case, the commission having issued so long ago as 1808, and 21 years having elapsed before any dividend was declared, it became the more necessary that the creditors to whom these dividends belong, or their representatives, should have had notice of the dividends being declared. The 110th section,

I perceive, is not imperative, but only authorizes the Court to order the distribution among the creditors.

1832.

Ex parte
FEDDEN.

Sir A. PELL.—Some notice should, certainly, be given to the creditors, or their representatives, when so long a period as 21 years was suffered to expire, before any dividend was declared.

Sir J. CROSS.—The 110th section of the act says, that the Lord Chancellor, or the Commissioners, may order the investment of any unclaimed dividends in the funds on account of the creditors entitled, and subject to such order as the Lord Chancellor may think fit to make respecting the same; who, if he shall think fit, may, after the same shall have remained unclaimed for the space of three years from the declaration of such dividends, order the same to be divided amongst the other creditors. Now, whether this enactment renders the investment of the dividends in the funds a condition precedent to their distribution, may be another question; though I should have thought, that no such condition is implied from the words of the act.

Sir G. ROSE.—The proper course, as it appears to me, is to advertise a meeting for a further dividend, and to give time for the parties interested to come in and claim these dividends. For it would be monstrous, after the lapse of 21 years in making any dividend, that these dividends should now be taken from the creditors on whose debts they are payable, without any notice to them, or their representatives. It is clear, what the duty of the assignees is under the 110th section—they ought to pay all dividends to the creditors,

1882.

**Ex parte
FEDDEN.**

within a twelvemonth after they are declared, or file a certificate containing a full and true account of them in the bankrupt office. The Court would then direct the proper inquiries to be made, and a further or final dividend to be advertised.

The Order made was, that the costs of the petitioner should be taxed by the proper officer, and that the balance of the unclaimed dividends, after deducting those costs, should be invested in the funds in the name of the Accountant-General, with liberty for any party hereafter to apply (a).

(a) And see *Ex parte Donaldson*, vol. i. 110; *Ex parte Robinson*, *ibid.* 542; and *Ex parte Goodhart*, *ibid.* 543, note (a).

Southampton
Buildings,
July 24.

When affidavits are referred to the Registrar for scandal, and one of the parties means to except to his report, the exceptions must be taken immediately the Registrar certifies.

Ex parte WILLIAMSON.—In the matter of WILLIAMSON.

IN this matter an order (a) had been made on the 7th July, that two affidavits alleged to be scandalous and impertinent, should be taken off the file, and referred to the Registrar, to see what parts of the affidavits were scandalous, and to report accordingly. The Registrar had finished his inquiry, and had prepared a draft of his report, finding that neither of the affidavits referred to him was scandalous.

Mr. *Anderdon* now moved, that so much of the order of the 7th July as directed the affidavits to be taken off the file should be discharged, or that the

(a) See vol. i. 529.

1832.

Ex parte
WILLIAMSON.

affidavits might be restored to the file, and permitted to be used on the hearing of the petition; and that the costs of this proceeding might be considered as costs in the matter of the petition. In the Court of Chancery, when affidavits are referred for scandal, they are never taken off the file until the Master has reported that the affidavits are scandalous. It is contended by the other side, that there must be a week elapse in this case after the Registrar makes his report, to give time to the party to make his exceptions to the report; but the object of this application is, to put the affidavits on the file again, *instantly*, before the expiration of the week.

Mr. *Montagu* contra. Exceptions were prepared to the report on Saturday last, the 21st July, but were not taken in form, as the Registrar had not then completed his report, but only proposed to certify.

Mr. *G. Richards*, *amicus curiæ*,—being called on by the Bench to explain what the practice of the Court of Chancery was in this respect,—stated, that the exceptions there were taken *instantly* to a certificate of this description, without any objections whatever being previously carried into the Master's office, and without any delay.

Sir G. ROSE.—I always understood this to be the practice on a certificate of the Master, when affidavits were referred for impertinence; though it is different when the Master makes his report.

Sir J. CROSS.—It seems to be agreed, that there is no settled practice on this point in bankruptcy; therefore,

1832.

Ex parte
WILLIAMSON.

if there is no rule to guide us here, we should seek our practice in the Courts of Common Law.

Sir A. PELL.—It really appears to me, that the practice of the Court of Chancery is so very uncertain, that no one point is ever exactly agreed upon.

The COURT finally ordered, that the Registrar should forthwith certify, and that the party should then immediately take his exceptions.

Southampton
Buildings,
July 24.

Ex parte AUSTEN—In the matter of AARON.

Semble: That when a petitioner obtains a conditional order of the Court, he is bound to prosecute such order, under the peril of paying costs to the other party.

THIS was a petition praying that the costs of three former petitions (a), which had been previously heard in this Court, and been decided in favour of the respondents, of whom the present petitioner was one, might be ordered to be paid.

Mr. *Montagu* and Mr. *Jacob*, in support of the petition, said, that the three petitions on which the order was made were removed into this Court, on the application of the petitioners in those petitions, namely, Messrs. *Lowe* and *Cuttill*; and after a hearing which occupied this Court no less than five whole days, an order was made on the 5th March, that the petitions should be dismissed with costs, unless Messrs. *Lowe* and *Cuttill* accepted the order of the Court, as to an inquiry with certain restrictions, within a week from the date of the order. They did accept that order within a week, namely, on the 12th March, and in less than a fortnight they gave us notice of their intention to dispute the order. On the

(a) See *Ex parte Lowe*, vol. i. 137.

1832.

Ex parte
AUSTEN,

26th March they applied that the petitions should be restored to the Lord Chancellor's paper, from which they were removed on the establishment of this Court; and they were restored accordingly. We contend, that we ought to be placed in the same situation as we were on the 5th March, namely, that they should pay us the costs of the three former petitions, unless they choose to accept the order; for the justice of the Court is not to be trifled with in this manner. With respect to the point of jurisdiction which may be urged on the other side,—it is not to be presumed, that this Court has not jurisdiction. The Lord Chancellor may have decided otherwise (a). But this Court entertained a different opinion upon that subject. And even supposing it has not jurisdiction, yet when a party comes voluntarily before the Court on petition, he then places himself within its jurisdiction,—as in the cases on short bills; *Ex parte Rowton* (b). But though the Court may not have jurisdiction over the principal matter, still it has jurisdiction over the costs. There are several instances where this Court, in deciding that it has no jurisdiction over a party, orders the costs to be paid by the other party, who endeavours to bring him before the Court. We do not, however, ask an order on the former petitions, but on the present petition *per se*.

Mr. Twiss contra. We came to this Court by direction of the Lord Chancellor, and not of our own accord. This is therefore not a parallel case to that of a party, without any authority, dragging a stranger before the

(a) See *Ex parte Benson*, vol. i. p. 324; and *Ex parte Lowe*, id. 31.

(b) 17 Ves. 432, 1 Rose, 15.

1852.

Ex parte
AUSTEN.

Court, over whom it has no jurisdiction. I applied myself to the Lord Chancellor for his directions, as to the Court before which the three former petitions were to be heard; when he directed us to this Court, and said that he had no jurisdiction in the matter, except by way of appeal from this Court (a).

Sir J. CROSS.—All that we know is, that Messrs *Lowe* and *Cuttill* have carried their petitions again to the Lord Chancellor, after they have been adjudicated upon by this Court. The Court of Review being a Court of concurrent jurisdiction, we are not to take it as the law, because the Lord Chancellor has on any point decided differently from this Court; but we must take it, that the law is still undecided on that point. Whatever deference and respect we should pay to the decision of another Court, yet this Court must act for itself, according to the best of its judgment.

Mr. TWIES. If this Court would now *ore tenus* rescind its former order in this matter, we should then know where we are. But, situated as we are at present under these contradictory decisions, I am bound to contend, that this is not a mere personal defect of jurisdiction, but a want of jurisdiction over the whole subject-matter; and therefore not like the case of *Ex parte Rowton*, which was a case where a party, over whom the Court had no jurisdiction, chose to come in and submit to the jurisdiction. But in this case, the parties, though they submit, cannot alter the general law of the land, and give the Court jurisdiction over a matter which was never within its jurisdiction.

(a) See *Ex parte Lowe*, vol. i. 31.

Sir G. Rose.—The question is here, whether, you having brought the other party to this Court, and placed him in a certain predicament as to expenditure, the Court cannot now adjudicate upon a question relating to the assignees and the bankrupt. You must judge for yourself—you must either prosecute the order, or abandon it.

1832.

Ex parte
AUSTEN.

The matter was finally arranged, by consent of both parties, that the petitioner should prosecute the former order before one of the Judges of this Court;—that the question of costs should be reserved, with liberty for either party to apply.

Ex parte PICKERING.—In the matter of **HADLEY.**

Southampton
Buildings,
July 25.

THIS was a petition of the assignee and the official assignee, under a commission which issued in 1817, praying that the bills of the solicitor might be taxed.

Although the solicitor's bill, has been paid, yet it will be ordered to be taxed, on application of the assignees, without any special reason being assigned for the taxation.

Mr. G. Richards appeared in support of the petition.

Mr. Montagu, for the respondent, contended, that when the solicitor's bill has been paid, as was the fact in this case, a special reason must be assigned for the application to tax it. But independently of this objection, the petitioners ought, under the provisions of the 6 G. 4. c. 16. s. 14, to have applied to the Commissioner, in the first instance, and not to this Court, to tax these bills; for they have no right to come here,

1832.

Ex parte
PICKERING.

unless they are dissatisfied with the previous taxation of the Commissioner. The petitioners ought to go to that tribunal, which the legislature has appointed to perform this duty.

Mr. *Richards*, in reply, said, that although a solicitor's bill has been previously paid, yet, in proceedings in bankruptcy, a party is not obliged to assign any reason for an application to have it taxed; for, in bankruptcy, the solicitor has no right to receive his bill, before it has been taxed by the Commissioners.

Sir J. Cross.—My difficulty is this. The commission issued 15 years ago, and the petition does not state whether any of these bills have been taxed, or not. The bills, which it is admitted have been paid, may have been paid several years since, and *non constat* but that they may have been also taxed. On the face of this petition, I am inclined to think, that the petitioner is not entitled to the order that he seeks.

The COURT, however, finally made the order for the taxation of such of the bills as were not already taxed, reserving all further directions.

Southampton
Buildings,
July 25.

Ex parte WILSON.

Where, from unavoidable accident, the Commissioners are prevented from meeting to take the bankrupt's last examination, the Court

IN this case, the meeting of the Commissioners to take the bankrupt's last examination had been advertised for the 6th July instant at Bradford, in Yorkshire; but, in consequence of the *cholera morbus* then prevailing

will appoint another day for that purpose.

in that town, no meeting of the Commissioners took place.

1832.

Ex parte
WILSON.

Mr. *Swanston* now applied, on behalf of the assignees, for an order that some other day might be appointed for this purpose.

Order made accordingly.

Ex parte DANIEL HARLING.—In the matter of
— HARLING.

Southampton
Buildings,
July 30.

THIS was the petition of a brother of the bankrupt, praying that the messenger, who had seized certain goods and furniture as the property of the bankrupt, but which the petitioner claimed as his own, might be ordered to withdraw from the possession of them. The petitioner stated, that he purchased these effects of the bankrupt on the 10th January, and took possession of them on the 7th February last, by putting in one *Harriet Bayliss* as his servant to take charge of them. The bankrupt had carried on the business of a baker; and the property thus purchased by the petitioner consisted of the bankrupt's stock in trade and furniture on the premises, where his business was carried on. The effects were not removed by the petitioner; but he swore that he continued the business in his own name,—that *Harriet Bayliss* conducted it for him, and accounted to him for all receipts and payments,—that all the weekly bills were made out in the name of the petitioner, and that flour was also bought in his name. *Harriet Bayliss* swore, that she saw the money paid by the

The Court will not interfere, by ordering the messenger to withdraw from the possession of goods which he has seized under the bankruptcy, in any case of reputed ownership.

1832.

Ex parte
HARLING.

petitioner to the bankrupt, for the purchase of these effects; and another witness swore, that he called on several customers for the amount of bills due to *Daniel Harling*, the petitioner. It appeared, however, that *Harriet Bayliss* was the servant of the bankrupt at the time of the alleged purchase, and that she continued to act in the same employment as she had filled before. The fiat was issued on the 11th May; but the bankrupt had previously, on the 14th April, gone to prison for debt, and on the 22d June following he was discharged under the Insolvent Act.

Mr. *Nichols* appeared in support of the petition. [Sir *A. Pell*. It is a very strong fact in the case, that although the receipt for the purchase-money bears date on the 10th January, possession of the articles purchased was not given till the 7th February. In all transactions of this description, any delay in taking possession of the property weighs very much against the *bona fides*.] The petitioner swears, that the consideration was paid in cash at the time specified, and that the reason why possession was not immediately delivered was, that the bankrupt having expressed an intention to repurchase the property, and to endeavour to make a composition with his creditors, he was allowed a reasonable time for that purpose. Where the not taking possession is consistent with the terms of the agreement between the parties, that circumstance has never been considered as a badge of fraud. [*Erskine*, C. J. Is there any affidavit that the money received by the bankrupt was never returned to the petitioner?] There is no affidavit of that fact. But there is nothing imputed on the other side to afford the slightest ground

for that suspicion, and the Court will not infer it. The petitioner states, that he was in the management of the business from the 7th February till the 23d June. [Sir J. Cross. What became of the bankrupt from the 7th February till the 14th April, the day he went to prison?] That does not appear.

1882.

 Ex parte
 Harling.

ERSKINE, C. J.—It is quite impossible, that the Court can interfere in such a case as this. If the petitioner thinks himself aggrieved, he may seek his remedy by an action at law. But here there was no possession given for a month after the alleged purchase,—the same servant as was employed by the bankrupt was continued to conduct the business,—the board, on which the bankrupt's name was painted, was never taken down,—nor does there appear to have been the slightest indication of any change of ownership.

Sir A. PELL concurred.

Sir J. CROSS.—One thing is clear in this case, that the bankrupt was the reputed owner of this property at the time of his bankruptcy. It is, therefore, by no means so clear that the petitioner has any remedy elsewhere.

Petition dismissed with costs.

1832.

Southampton
Buildings,
July 30.

Where the assignees refuse to bring an action for the recovery of property, which a creditor alleges to have belonged to the bankrupt, the Court will not order a new election of assignees, but will permit the creditor to bring the action in the name of the assignees, upon entering into a proper indemnity.

Ex parte RYLAND.—In the matter of ELSTON.

THIS was the petition of a creditor, praying that the assignees already elected under the commission might be discharged, and that the creditors might proceed to the choice of new ones; and that *Daniel Elston*, the brother, and also a creditor of the bankrupt, might be restrained from voting in such new choice. The commission issued on the 13th July 1829, on the petition of the bankrupt's brother, *Daniel Elston*, and a dividend of only 6d. in the pound had been paid on the debts proved, which amounted to 2496l.; of which sum *Daniel Elston* had proved for 1500l. The bankrupt had, previous to his bankruptcy, kept a private cash account at the Bank of England; and when the commission issued, there was a balance of 300l. standing in his name at the bank, which was claimed by one *Eliza Braddick* as her property. There being this conflicting claim, the bank refused to pay the money to the assignees, until they had established their right to it; and the assignees refused to take any steps to recover the money from the bank, unless they were indemnified.

Mr. *Swanston* appeared in support of the petition.

ERSKINE, C. J.—You must show some reason, why the management of the estate should be taken out of the hands of the assignees. Would not the best course be for you, to bring an action for the money in their

Mr. *Bligh*, for the assignees, objected to this arrangement, the assignees being perfectly willing to bring the action, if they were properly indemnified.

1832.

 Ex parte
 RYLAND.

Mr. *Swanston* said, that the petitioner had no objection to indemnify the assignees, provided he had the conduct of the action.

The COURT made the Order accordingly, that the petitioner, upon entering into the proper indemnity, might bring an action in the names of the assignees, and have free access to the proceedings under the commission, to enable him to prosecute the same. Costs to be reserved.

Ex parte HENRY HARDY.—In the matter of SIMON
 HARDY.

Southampton
 Buildings,
 July 30.

THIS was the petition of an equitable mortgagee, praying for a sale upon the usual terms, and that his claim might be satisfied out of the proceeds of the sale, before that of a subsequent legal mortgagee of the same property. The estate in question was an undivided third part of 18 acres of land, which the bankrupt took under a will, of which two undivided third parts were also devised to the petitioner. It appeared that the bankrupt had granted an annuity to the petitioner; and when the annuity deed was executed, he agreed that all the deeds relating to the estate he took under the will should be deposited with the petitioner, for better

An equitable mortgagee will not be preferred to a subsequent legal mortgagee, who has no notice of the equitable mortgage; and the *onus* lies upon the former, claiming a priority, to prove that the latter had such notice.

1882.

Ex parte
Hardy.

securing the payment of the annuity. When the subsequent legal mortgage was executed by the bankrupt, the mortgagee had notice that the deeds were in the possession of the petitioner.

Mr. *Montagu* appeared in support of the petition. The question in this case is, whether a subsequent legal mortgagee, who has notice of a previous equitable mortgage, is entitled to a priority over the equitable mortgagee. [Sir J. Cross. You are aware, that you are not contending for the same identical estate. The deposit is for an undivided third part of 18 acres of land; but the legal mortgage is for six acres of land.] Where a purchaser, at the time of the conveyance to him of the property, has reason to believe that the title-deeds are in the hands of another and prior claimant, his rights will be postponed until the prior claims of the equitable mortgagee are satisfied; *Hiern v. Mill* (a). [Sir G. Rose. The legal mortgagee in this case does not appear to have had any notice of the prior claim. He has only notice that the deeds are in the possession of *Henry Hardy*, who is the largest owner of the property devised by the will, and who is therefore the proper custody with whom the deeds should be deposited; *Henry Hardy* being entitled to 12 acres, and the bankrupt only to six.] The legal mortgagee had nevertheless such notice as should have induced him to make further inquiry; and if he has been guilty of any *crassa negligentia*, he is bound by the prior equitable mortgage. [Erskine, C. J. Then it is for you to prove the notice.] The other side having submitted to the

(a) 13 Ves. 114.

jurisdiction, they are bound to produce all the evidence relating to the notice.

1832.

Ex parte
HARDY.

Mr. *Swanston* appeared for the legal mortgagee, and refused to produce any of his title-deeds.

Mr. *Metcalf*, for the assignees, was willing to take any order which the Court might make.

ERSKINE, C. J.—As against the assignees, the petitioner has made out a good case; but the question is, whether he has done so against the legal mortgagee; and this all depends upon the fact of notice. Now, although on the production of the will to the legal mortgagee, it might appear that the bankrupt had no right to the possession of the title-deeds relating to the property in question, there is nothing to show that he had any knowledge of the prior equitable mortgage to the petitioner.

The rest of the COURT concurring,

The petition, as against the legal mortgagee,
was dismissed with costs.

In the matter of CHAMBERS.

MR. *MONTAGU* applied to the Court, that a petition in this matter might be heard by the Judges in their private room; this application being made with the consent of all parties interested in the petition.

Southampton
Buildings,
July 25.

Quære: Whether the Court of Review has power to hear a case in private, if they think a public hearing

will be detrimental to the interests of justice.

1832.

In re
CHAMBERS.

Sir A. PELL thought that this could not be done, consistently with the directions contained in the second section of the Bankruptcy Court Act, without a general rule made by the Court and sanctioned by the Lord Chancellor, pursuant to the provisions of the 11th section of the statute.

Sir J. CROSS was inclined to think, that the Court had this power, if they deemed it expedient for the interests of justice; as the first section of the act conferred upon this Court "all rights, incidents, and privileges, as fully, to all intents and purposes, as the same are used, exercised, and enjoyed by any of his Majesty's Courts of Law or Judges at Westminster."

Mr. *Swanston* (who was with Mr. *Montagu*) contended, that under this section it would be competent to the Judges of this Court to hear a case in private, if the necessity of the case required it. In the present instance, it will be injurious to the pecuniary interests of one of the parties, to have the petition heard in public. The second section of the act is not inconsistent with the first, but merely points out the mode in which the provisions of the first are to be exercised; and if the Court can put a construction upon these two sections, so as not to make them repugnant to each other, the Court will no doubt endeavour to do so, whenever the purposes of justice require it. As the first section gives the Court the same rights and privileges as any Court in Westminster Hall, and as there is no question but that those Courts have, and sometimes exercise, the power of hearing a case or motion in private, where they think the purposes of justice

1832.

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CHAMBERS.

would be defeated, or the parties injured, by a public discussion,—so has this Court in like manner the same authority given it by the legislature. But if the Court should think it does not possess this power, without making a rule on the subject, then we ask them to promulgate a rule for that purpose, under the provisions of the second section of the statute.


Sir A. PELL.—I would not abandon express words in an act of parliament, to meet particular cases.

ERSKINE, C. J.—There is this difficulty in acceding to the application, which should not be overlooked. If the Court were to sit in private, for the purpose of hearing this petition, and it was to turn out in the result that they had not power to do so,—any order they might make would, in this predicament, be of no avail.

Sir J. CROSS.—The question is, whether we can do this under the existing rules. It is quite clear, that the Court has power to make such a rule.

The COURT inclined to make a general rule on the subject, but said they would give the matter further consideration (*a*).

(*a*) But see *Re Falk*, post, p. 415.



1832.

*Southampton
Buildings,
July 31.*

An equitable mortgagee is entitled to the growing crops and rents, from the date of the order of sale.

Ex parte SAMUEL BIGNOLD.—In the matter of GEORGE BROOKE KEER.

THIS was the petition of an equitable mortgagee, claiming to be entitled to growing crops. The fiat issued on the 7th February 1832, and on the 27th April following the petitioner obtained the usual order of reference to the Commissioners, to inquire whether the petitioner was an equitable mortgagee, and to take an account of what was due to him, and for a sale of the mortgaged property, such sale to be under the conduct of the assignees. The Commissioners found that there was due to the petitioner the sum of 7109*l.*, and with the approbation of two previous legal mortgagees, ordered the property to be put up to sale by auction on the 21st June last; previous to which the petitioner, on the 8th June, obtained an order for leave to bid at the sale. Part of the property was sold, and part bought in. But the amount due to the petitioner, as such equitable mortgagee, not only exceeded the amount of the part that was sold, but also the estimated value of the parts remaining unsold. Some of the property was in the occupation of the bankrupt at the time of his bankruptcy, and afterwards of his assignees; and various crops of hay, barley, and wheat, were then growing thereon. Another part of the property consisted chiefly of public-houses let to various tenants at yearly rents. The petitioner alleged, that the assignees had cut and gathered, or were about to cut and gather, the crop of hay; and that they also intended to cut and gather the crops of barley and wheat, and to receive the rents of the public-houses. The petition then stated, that the

1832.

Ex parte
Bignold.

assignees were duly authorized by the creditors to sell, or concur in the sale of, any part of the bankrupt's real estate by private contract; and that it was considered that it might be expedient for the assignees to act on such authority, by contracting with the petitioner for the sale of the lots that were bought in at the auction; and that the petitioner was disposed, with the sanction of the Court, to treat for the purchase of the same.

The petitioner therefore prayed, that he might be declared, as such equitable mortgagee, to have a lien upon the crops growing on such of the estates as were cropped, and to the produce thereof since the bankruptcy, and also to the rents of the other parts of the property that were let at the time of the bankruptcy, and had since accrued, and were then accruing; and that he might be at liberty to cut, gather, and sell such crops, and receive the money arising therefrom, as well as the said rents: That the assignees might be restrained from selling the crops, or receiving such rents: That an account might be taken of what money had come to the hands of the assignees, in respect of the crops, or other produce of the mortgaged premises, and the amount thereof be paid to the petitioner: And that the petitioner might be at liberty to purchase from the assignees the unsold lots, or any of them, by private contract:

Mr. *Montagu* appeared in support of the petition, and cited *Ex parte Bignold* (a), where Sir *J. Leach*, when Vice-Chancellor, decided that an equitable mortgagee was entitled to the produce of the mortgaged estate, from the time of presenting his petition for a sale:

(a) 2 G. & J. 273.

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Ex parte
BIGNOLD.

He admitted, however, that in the subsequent case of *Ex parte Alexander* (a) Lord Eldon held, that an equitable mortgagee was not entitled to the rents and profits of the mortgaged estate previous to the sale. And he therefore consented to waive the claim of the petitioner in the present case to the crops, from the time of his presenting the petition for a sale, and was content to claim them from the time of the order for sale.

Mr. *Wright*, for the assignees, said that the case of *Russel v. Russel* (b), which was the first case deciding that the mere pledge of title-deeds with a creditor gave him the rights of an equitable mortgagee, ought not to be carried further than it had already gone before the case of *Ex parte Bignold*. For, until that decision, no one ever heard of an equitable mortgagee being declared to be entitled to take the crops off the land. An equitable mortgagee cannot even give receipts, or distrain, for the rents of the property on which he claims a lien, without first obtaining an order of the Court appointing him a receiver. [Sir *J. Cross*. If this Court had made an order for the sale of a field, on which a crop of wheat was growing, would not that order apply to the crop, as well as the land?] Not unless the attention of the Court had been drawn to it, and the sale of the crop specifically directed by the order. But I contend, that an equitable mortgagee is entitled at no time to the growing crops on the land; and more especially in this case, where there is a prior legal mortgagee, and whose title to the crops is therefore preferable to that of the petitioner.

(a) 2 G. & J. 275.

(b) 1 Bro. 269.

Mr. *Sidebottom* appeared for the legal mortgagees.

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BIGNOLD.

ERSKINE, C. J.—The question before the Court is, whether the petitioner is entitled to the growing crops and the rents of this mortgaged property, from the date of the original petition for the sale of it, from the date of the order of sale, or at any other time. It is contended on behalf of the assignees, that the petitioner is entitled from no time. But it appears to me, that neither the argument of the counsel for the assignees, nor the prayer of the petition itself, can be supported to the full extent. In *Ex parte Alexander* (a), which was argued in August 1826, Lord *Eldon* intimated his opinion to be, that an equitable mortgagee was, under the circumstances there stated, entitled to a receiver,—and to have an account of the rents and profits either from the date of the order for sale, or from a reasonable time within which the assignees might effect a sale of the premises. But he added, that as that was a new and special case, he should deliver his order in writing. After the case of *Ex parte Alexander* had been argued, *Ex parte Bignold* came on before the Vice-Chancellor in April 1827. And it appears from the Registrar's book, that the point in dispute in that case was, from what time the crops should be taken,—whether from the date of the petition, or of the order for the sale of the property, or from any subsequent period; and the Vice-Chancellor declared, that he was entitled to them from the time of presenting his original petition. After that decision of the Vice-Chancellor, Lord *Eldon*, in June 1827, gave his written judgment in *Ex parte Alexander*, after he had resigned the great seal; and,

(a) 2 G. & J. 276.

1838.

**Ex parte
BIGNOLD.**

very probably, did not then know of the recent decision of the Vice-Chancellor in *Ex parte Bignold*. For he says, "I have not been able to learn that there is in bankruptcy any precedent, for allowing a creditor not in possession to obtain an order, not only for the sale of the estate, but also to be allowed in the meantime by himself, or, if an equitable mortgagee, by a receiver, to obtain, in diminution of his debt, the rent which had or should become due before the sale." He draws a distinction, however, between an equitable mortgagee suing in a cause, and one applying for an order in bankruptcy; in the latter case, obtaining as he does a sale, which he could not obtain in a cause, but merely a foreclosure. And he adds, "the rule of Court, as to the relief given to equitable mortgagees, has long been settled; and the Court's orders are the best expositors of that rule." The order made, therefore, by the Vice-Chancellor in *Ex parte Bignold* must be our guide on the present occasion. But as the petitioner in this case consents to receive the rents and profits from the date of the order, instead of from the time of presenting his petition for a sale, the latter question is consequently not raised for our decision. The proper order will be, therefore, that the petitioner is entitled to the crops and rents from the date of the order for sale.

Sir A. PELL.—The question that we have to consider in this case would lie in a small compass, were it not for the extraordinary terms in which the judgment of Lord Eldon is drawn up in *Ex parte Alexander*. In this case, however, we have no other party before us but the equitable mortgagee and the assignees; there is no landlord, or other party, before the Court.

Upon the question of principle, there is the authority of *Ex parte Bignold* decided by Sir J. Leach, who held that an equitable mortgagee was entitled to the produce, from the time of presenting his petition for a sale. Why should he not be so entitled? The only reason that can be assigned is, that since the case of *Russel v. Russel*, equitable mortgagees have not been favoured. All I can say is, that if they have not, I know not why they should not. If Lord Eldon had disapproved of the decision in *Ex parte Bignold*, he would have overruled it (a). The only distinction between a legal and an equitable mortgagee is, that the latter has no conveyance of the estate to himself,—but merely the deposit of the title-deeds, which a Court of Equity considers as equivalent to a mortgage deed. Every Lord Chancellor, when the question has come before him, has decided in conformity with *Russel v. Russel*. If that case therefore is not law, let it be overruled; but while it is admitted to be law, we must act according to the principle it lays down. And as I have reason to believe that the case of *Ex parte Bignold* was rightly decided, I think the prayer of this petition should be granted.

1882.

Ex parte
BIGNOLD.

Sir J. Cross.—I have had some difficulty in discovering, exactly, what question the Court was in this case

(a) *Ex parte Bignold*, though decided, was certainly not reported, until long after Lord Eldon had given his judgment in *Ex parte Alexander*; and from the whole tenor of that judgment, there is no doubt that he was perfectly unaware that such a decision had taken place. For “if precedent,” he says, “can be produced to prove that the Court has given such relief as this petition prays, that precedent should be furnished; if there be no precedent, the petition must be dismissed with costs. If there be a precedent, let the order or orders establishing it be produced.”

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BIGNOLD.

called on to decide. But now I find that we are required to determine, as an abstract question of law, from what time an equitable mortgagee is entitled to the crops of the mortgaged estate. For my part, I shall decide no abstract question of law on the present occasion, but merely confine myself to such judgment as may be called for by the prayer of the petition. It is alleged in the petition, that part of the estates were sold, and part bought in; but which particular portion of the property was sold, and which bought in, the petitioner does not say; he merely states, that various lots were by arrangement with the assignees bought in. The order made by this Court for the sale of the lands belonging to these estates was in effect, I think, an order to sell all the crops growing on them, and that the value of such crops should be paid over to the petitioner. The assignees ought to show some right to retain these crops; but they have made out no case of the kind. I am of opinion, therefore, that the petitioner is clearly entitled to all the crops growing on the lands of those estates, that were bought in at the sale on the 21st June.

Sir G. ROSE.—It appears to me, that Mr. *Montagu* removed all difficulty whatever from the case, by consenting on behalf of his client to take the crops from the date of the order, instead of from the period prayed by the petition. *Ex parte Alexander* is, I think, perfectly reconcilable with *Ex parte Bignold*; for Lord *Eldon* expressly draws the distinction between the nature of the relief given to an equitable mortgagee suing in a cause, and where he applies for an order in bankruptcy. Mr. *Wright* put the argument too far, in contending that the crops in this case would go, as a

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Ex parte
BIONOLD.

matter of course, to the legal mortgagee, in preference to the petitioner. For there might be a question raised on a legal mortgage, with respect to the title of the mortgagee to emblements. The principle would be the same as well in the case of a legal, as of an equitable mortgage. Whether, indeed, a Court of Equity would interfere in the case of a bill filed by a legal mortgagee, alleging the mortgagor to be in a state of insolvency, and praying therefore for an injunction to restrain him from cutting timber on the mortgage estate,—might admit of some doubt. But the Vice-Chancellor having decided that in bankruptcy a mortgagee is entitled to the produce of the lands mortgaged, I think the petitioner is in this case entitled to the relief he prays. I apprehend, therefore, that the order will be, as his Honour the Chief Judge has already pointed out.

The Order made was, that the petitioner was, from the date of the order for sale, entitled to the crops growing on such of the estates as were cropped, and to the produce thereof since that time, and also to the rents of the other parts of the mortgaged premises that were then accruing, have since accrued, are now accruing, or may hereafter accrue,—as a security for payment of what was due to the petitioner; subject nevertheless to the petitioner allowing to the assignees the expenses, if any, incurred by them in the cultivation of the mortgaged premises. That the assignees should forthwith account for all monies come to their hands, in respect of such

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BIGNOLD.

crops and rents, in taking such account, and that all just allowances should be made to them for the expenses of cultivation incurred by them as aforesaid. That for the better taking such account, all necessary and proper parties should be examined before the Commissioners upon interrogatories, or otherwise, as they should think fit, and should produce before them upon oath all books, papers, and writings in their custody, as the Commissioners should direct; and that the amount of what should be found due from the assignees should be paid over to the petitioner. That the petitioner should manage and gather and sell the crops, and receive the rents, and the money arising from the sale of the crops. That he should be at liberty to purchase from the assignees the unsold lots by private contract; and that all parties should be paid their costs of this application out of the proceeds of the sale of the crops.

Southampton
Buildings,
August 7.

Ex parte MYERS.—In the matter of GOLDSMID.

A power of attorney from a creditor residing abroad to sign the bankrupt's certificate, is sufficiently authenticated by the attestation of a notary public, without any affidavit to verify the signature.

MR. PALK applied to the Court for an order, that a power of attorney to sign the bankrupt's certificate, which had been executed by a creditor residing abroad, and attested by a notary public, according to the requisitions of the 6 G. 4. c. 16. s. 124, might be received at the Bankrupt Office, without an affidavit of the signature of the creditor. He offered, however, to procure

an affidavit verifying the signature, if the Court should think such a document necessary.

But the Court granted the order as prayed, without imposing this as a condition (a).

1832.

Ex parte
MYERS.

(a) With respect to the mode of authenticating a letter of attorney executed by a creditor residing abroad, there is a material difference between the wording of the 61st section, which relates to powers of attorney to vote in the choice of assignees, and the 124th section, which relates to powers to sign the certificate. The former section directs that the letter of attorney must be verified "by oath before a magistrate where the party shall be residing, duly attested by a notary public, British minister, or consul." But sect. 124 directs, merely, that the "authority of such creditor shall be attested by a notary public, &c." So that in the last case no affidavit or oath appears to be necessary for the purpose of verifying the signature of the creditor.

Ex parte HINTON.—In the matter of PARKER.

Southampton
Buildings,
August 7.

IN this case, the Court had made an order on the 27th June last to annul the fiat at the costs of the bankrupt and the solicitor who had issued it, on the ground that the bankrupt was not a trader, and that some improper collusion had been practised by the bankrupt and solicitor, in the issuing of the fiat. On the 20th July those parties petitioned the Lord Chancellor, that the order of the Court of Review for annulling the fiat might be stayed, until an appeal from the decision of that Court could be heard by the Lord Chancellor, and that the parties might appeal by way of petition, and not by way of special case. The Lord Chancellor said, that an application to stay the order must be preferred to the Court of original jurisdiction that made the order;

An appeal to the Lord Chancellor from the Court of Review does not lie, where the point determined is a mere matter of fact; but only where it involves a matter of law or equity, or is connected with the refusal or admission of evidence. Therefore, where the question is, merely, whether a party is, or is not, a trader, this is not the subject of an appeal.

to grant a special case, where a party is entitled to appeal; but he has a right to it, if his facts are properly stated.

An appeal pending is not a sufficient ground for staying proceedings, more especially, when it is plain that the appeal is brought for the purpose of delay.

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—
Ex parte
HINTON.

and that the facts stated were not sufficient to bring the case within the exception of the third section of the Bankruptcy Court Act, which gives the Lord Chancellor power to direct an appeal to be otherwise than by special case (*a*); and his lordship dismissed the petition, but without costs, as it was the first case of this description that had come before him.

Mr. *Montagu* now applied to this Court, that the order for annulling the fiat might be stayed, until the hearing of the special case by the Lord Chancellor; the parties undertaking to deliver the special case within ten days. The point to be determined by the Lord Chancellor was, whether this Court drew a legal inference from the facts before it on the hearing of the former petition, in deciding that the bankrupt was not a trader; and whether a petition to annul a fiat should not show that it is presented by a creditor (*b*).

ERSKINE, C. J.—We decided merely on what the intention of the bankrupt was, in the purchases he made of two or three horses, and of some potatoes and hay,—whether with the *bonâ fide* intention of dealing in those articles for his livelihood, or for the sole purpose of being made a bankrupt. We gave our judgment on a simple question of fact.

(*a*) The words of the section (1 & 2 W. 4. c. 56. s. 3.) are, that “in all cases of appeal to the Lord Chancellor by virtue of this act, such appeal shall be on a special case, and in no other mode whatever, except the Lord Chancellor shall in any case otherwise direct.”

(*b*) This objection was taken by Mr. *Montagu*, on the hearing of the petition to annul the fiat; but the Court overruled it, on the authority of the case of *Ex parte Tolson, re Stone*, which was referred to by the Registrar.

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Ex parte
HINTON.

Mr. *Swanston*, and Mr. *Bagshaw*, appeared to support the order. There was no question of law decided by the Court on the former hearing, that in any way calls for an appeal. Nothing was determined but a mere question of fact. And with regard to the interest of the petitioner, there was no question of law in that point deserving to come before a tribunal of appeal. The costs were directed to be paid to *Hinton*; therefore, whether he had a legal interest or not, he had clearly an equitable one. But, at all events, the present application comes too late. The parties ought to have applied for a special case when the order was made, namely, on the 27th June. It was competent also for them to have applied earlier to the Lord Chancellor, if they intended to appeal. But although they petitioned the Lord Chancellor to stay the order for annulling the fiat, until a petition of appeal could be heard by his lordship, yet nothing was done by them to put the case in a way of appeal. There was plenty of time from the 27th June before the 20th July, if the parties had used due diligence, to take some steps that would have shown they really intended to appeal. If the Lord Chancellor had granted the application made to him yesterday, the new statute for the administration of the law in bankruptcy would have been repealed for two or three months. An appeal does not as a matter of course stay proceedings; and therefore if the Court granted a special case, this would not stay proceedings. The parties might have prepared their special case in the course of ten days; when it might by this time have been disposed of. But if granted now, it cannot be heard by the Lord Chancellor before November. Besides, it is necessary, under the terms of the 3d sec-

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HINTON.

tion of the act of parliament, that the special case should be approved and certified by one of the Judges of this Court.

Sir A. PELL.—The Judges have given no opinion about the right of the party to appeal.

ERSKINE, C. J.—It is not a matter of discretion in this Court, to grant an appeal on a special case. The party has a right to it, if his facts are properly stated.

Mr. *Montagu* in reply. The real question is, whether more good, or evil, will result from staying this order, until a special case can be prepared. An application to stay a *supersedeas* was, by the former practice in bankruptcy, always made to the Lord Chancellor, and not to the Vice-Chancellor. We therefore thought, that the application in this case should also be made to the Lord Chancellor, in the first instance. Such a delay will not occur again, as we now know what the practice is.

ERSKINE, C. J.—The only object which a Judge ought to have in view, is to deal out equal justice to all parties; and it has always been my anxious endeavour to keep such an object prominent in my mind. If there was any thing in this case, either in point of law or equity, which was a foundation of appeal, I should have been very glad that it should have been sent from this Court for a better judgment. But I can discover nothing in the semblance of either a legal or equitable question, that can in any way be the subject of an appeal. For whether the bankrupt was, or was not, a

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Ex parte
HINTON.

trader, was a mere question of fact; and the third section of the act gives "an appeal to the Lord Chancellor on matters of law and equity, or on the admission or refusal of evidence only." It is however asked by the parties who are dissatisfied with our decision, that we should suspend the order for annulling the fiat. There is no case made out for our granting this application. The essential question we had to determine when we made the order was, whether *Parker* was a trader or not, within the bankrupt law; that is, whether it was his intention to deal generally in those articles, which he upon two or three occasions bought and sold. The law that was applicable to this case was admitted; and nothing remained for us to determine, but the fact. The result was, that the Court was of opinion that *Parker* was not a trader. The next question we had to decide, was, whether it sufficiently appeared to us that *Hinton* was such a creditor of the bankrupt, as to be entitled to present the petition. The Court was of opinion, that he was such a creditor. Entertaining therefore no doubt whatever on both these points, which were mere matters of fact, and not matters of law or equity, or connected with the refusal or admission of evidence, I cannot consent to grant this motion; for by doing so, I should imply that I did entertain some doubt. The Lord Chancellor has, I understand, in more than one instance refused to stay proceedings, merely because an appeal was pending. But independently of any authority on the subject, it is sufficient to say, that in this case the application is made too late, and appears to be made for no other purpose than delay.

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HINTON.

Sir A. PELL.—In days like these, it is hardly to be expected that justice will be done to the proceedings of this Court, however anxious the Court may be to do its duty to every litigant party. It appears, that the order in this case was made on the 27th June, and it was not till yesterday that it was brought before the Lord Chancellor. The Chancellor, I am informed, intimated, that in future such an application would be dismissed with costs. The Lord Chancellor, it seems, was not to be terrified by such an application—no more will we. Nothing whatever that has been done by the parties who make this application, is warranted by the statute; and it is but too plain that it is made for delay, and for no other object. The parties are well aware, that an appeal by way of special case could not now be heard by the Lord Chancellor, at the earliest period, before next Michaelmas term, and very likely not for a twelvemonth from this time. It is easy in a Court of Justice to say, that an individual is not to be injured by an erroneous judgment; but the mere assertion of a discontented litigant is not to go for the proof of judicial error. I have often heard in this Court the counsel for these parties cite, on other occasions, the well-known maxim of “*Vigilantibus et non dormientibus serrat lex.*” Now, where has been his vigilance in the present case? The order of this Court was made on the 27th June, and there is no application to impeach it for six weeks afterwards. Upon these grounds, and for the reasons assigned by his Honour the Chief Judge, I am of opinion that this application should be dismissed with costs.

Sir J. CROSS.—This is an application to stay pro-

ceedings on an order pronounced by this Court, on the alleged ground of an appeal from that order to the Lord Chancellor being now depending. But I am at a loss to discover that there is any appeal now depending, that can justify this application; though, if there had really been an appeal, I for one should have been disposed to give every facility to appeals from this Court. In this case, however, there is no appeal given by the statute; for the point decided was a simple question of fact, namely, whether the party was a *bonâ fide* trader within the bankrupt law,—or whether he had not contrived a trading of his own, for the purpose of being made a bankrupt.

Motion rejected with costs.



Ex parte ORGILL.—In the matter of BINGLEY.

Southampton
Buildings,
August 7.

THE bankrupt in this case had been appointed a trustee for the petitioner, under a conveyance in trust to sell certain property, and account for the proceeds to the petitioner. This conveyance was by way of mortgage, to secure the repayment of a sum of money, which the petitioner had lent to the mortgagor. The mortgagor had become bankrupt, as well as the trustee; and the present petition was presented on behalf of the *cestui que trust*, under the 79th section of the 6 Geo. 4. c. 16., praying that the Court would order the bankrupt trustee and his assignees to convey the property to some other trustee, in his room.

Where a conveyance by way of mortgage is made to a trustee for the mortgagee, in trust to sell, and the trustee becomes bankrupt, the mortgagor should join in the application for the appointment of another trustee.

Mr. *Wright* appeared in support of the petition.

1832.

Ex parte
WILLIAMSON.

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Ex parte
O'NEILL.

The COURT said, that the Order could not be made without the consent of the assignees of the mortgagor; but directed that the Order should be drawn up as prayed, on the petitioner producing such consent.

Southampton
Buildings,
August 7.

A reference for *scandal* in an affidavit will be granted, even after the petition has been heard; but not a reference for *impertinence*.

Ex parte WILLIAMSON.—In the matter of WILLIAMSON.

MR. *ANDERDON* moved for an Order to refer an affidavit to the Registrar for scandal. The affidavit was sworn in the matter of this petition, which was heard on the 2d August (a); but though the petition was disposed of, he claimed his right to make the present application; contending that there was a distinction in the practice of the Court between a reference for *scandal*, and a reference for *impertinence*. For *scandal*, you may refer at any time,—but for *impertinence*, not after the matter has been dealt with.

The COURT acknowledged this distinction, and made the Order accordingly (b).

(a) See vol. i. p. 549.

(b) And see *Ex parte Williamson*, vol. i. p. 529.

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In the matter of FALK.

IN this case the Commissioner had adjourned the examination of one *Hayman Levien* to be taken before the Court of Review, under the provisions of the 30th section of the Bankruptcy Court Act (a). It appeared, that on his examination before the Commissioner, on the 19th July, *Levien* was asked the following questions, to which he returned the following answers:

Question. “Look at the invoice of the 18th February 1832, and say to whom you sold the goods therein mentioned.”

Answer. “I cannot tell to whom I sold the goods, specifically; but I can tell how I disposed of those I received from the bankrupt. I sold them to several parties.”

Question. “To whom.”

Answer. “I refuse to answer that question, under the advice of my solicitor.”

Mr. *Montagu*, who appeared for the assignees, said, that it would be highly expedient in this case, that the inquiry should be proceeded with in private.

Sir J. Cross.—It may be very convenient; but the question is, whether it is competent to the Court to hear the matter in private.

Mr. *Montagu*. I understood that a rule had been made, to enable the Court, at its discretion, to take examinations privately.

(a) 1 & 2 Will. 4. c. 56.

Southampton
Buildings,
August 7.

Where a bankrupt has sold goods to a party for a price considerably lower than what he gave for them, the purchaser, when summoned before the Commissioner for examination, is bound to answer the question “to whom did you subsequently sell these goods;” for it materially concerns the estate of the bankrupt, to ascertain whether the sale by him was *bond fide*.

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ERSKINE, C. J.—No—such a rule was thought of (a), but it was not proceeded with. You might, however, contend for a private examination in this way. The Commissioner having the power to take a private examination, it may be argued, that if he adjourns such an examination to this Court, the inference would follow, that we should continue to hear the examination in private.

Sir A. PELL.—I am prepared at once to give my opinion on this matter, under the construction I put upon the words of the second section of the Bankruptcy Court Act. I think, in accordance with the terms of that section, that as we have as yet made no rule of practice relative to private hearings, we have no authority to proceed with this examination in private. And even if we had the power, it must be a very strong case indeed that could induce an English Judge to hear a case in private.

Sir J. CROSS.—Would not a difficulty in all these cases be saved, by the Commissioner in future referring a private examination to the Subdivision Court, and a public one only to the Court of Review?

ERSKINE, C. J.—Perhaps it will be better that the argument should proceed, first, on the legal obligation of the examinant to answer the question; in which case, the point of law can be settled distinct from any inquiry.

Mr. *Montagu* then repeated the same question to

(a) See *Re Chambers*, ante, 395.

Levien, which had been put to him before the Commissioner.

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Mr. *G. Richards*, who appeared on behalf of the examinant, objected to the question. It appeared, from the date of the invoice, that the goods were purchased by the witness of the bankrupt on the 18th February; and the act of bankruptcy was not committed till the 8th March, nor did the fiat issue before the 26th April. The party, who presses for the examination, can only proceed under the 33d or 34th sections of the Bankrupt Act (*a*); and this case does not come within the terms of either of those sections. The 33d section declares, that it shall be lawful for the Commissioners "to summon before them any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, or any person whom the Commissioners believe capable of giving information concerning the person, trade, dealings, or estate of such bankrupt." Now, this examinant has not any *estate* of the bankrupt in his possession, nor is he *indebted* to the bankrupt; nor is it pretended, that he is capable of *giving information concerning the person, trade, dealings, or estate of the bankrupt*. As little is the question warranted by the 34th section; which says, that the Commissioners may examine any person "concerning the person, trade, dealings, or estate of such bankrupt, or concerning any act or acts of bankruptcy by such bankrupt committed." For the property which is the subject of this inquiry does not concern the *person, trade, dealings, or estate of the bankrupt, or any act of bankruptcy*. The examinant purchased the goods of the bankrupt,

(*a*) 6 Geo. 4. c. 16.

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and then he sold them. It does not appear that, as such purchaser, he is in any way implicated in any fraud that has been practised by the bankrupt, even if such is imputed. But these goods were bought of the bankrupt more than two months before the issuing of the fiat; and therefore no interest whatever can be claimed in them by the assignees.

Sir J. CROSS.—As yet, the Court has certainly not before it any grounds to know, or suspect, that these goods are part of the estate of the bankrupt. For there is nothing to show that *Levien* is not, to all intents and purposes, the legal owner of these goods.

ERSKINE, C. J.—The difficulty which weighs upon the Court is this—that as we are not in possession of *Levien's* previous examination, we are at a loss to know what foundation there is for saying that these goods belong to, or concern, the estate of the bankrupt.

Mr. *Montagu*. The Commissioner is entitled to know what the real nature of the transaction is, that has taken place between the bankrupt and the examinant. Both the 33d and 34th sections enable the Commissioner to summon before him and examine any person, whom he believes capable of giving information concerning the *dealings* of the bankrupt. Now it appears from the examination of the bankrupt, that he bought these goods for 1356*l.*, and that he afterwards sold them to *Levien* for 810*l.*; so that no less a sum than 546*l.* has been charged for discount. *Levien*, in the previous part of his examination, admits that he purchased the goods of the bankrupt for 810*l.*

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The COURT, after some deliberation, decided that the examinant was bound to answer the question; the Chief Justice saying, that there could be no doubt but that it materially concerned the *estate* of the bankrupt, to ascertain whether this was a *bonâ fide* sale by the bankrupt to *Levien*.

Order, that it be referred back to the Commissioner, to proceed in the examination forthwith.

Ex parte HENRY MOULT and others.—In the matter of THOMAS BARROW and GEORGE GEDDES.

Coram Lord Chancellor,
Lincoln's Inn
Hall, August.

THIS was a petition of appeal to the Lord Chancellor, by way of special case, from a proceeding in the same matter in the Court of Review (a). The petition of appeal stated the prayer of the former petition, namely, that Messrs. *Williams, Deacon & Co.*, who had proved a debt against the joint estate, and also against the separate estate of *Geddes*, might be ordered to elect whether they would remain creditors against the *joint* estate, or the *separate* estate of *Geddes*. It then stated the former hearing of the matter in the Court of Review; that upon such hearing the Judges were divided in opinion upon the question contained in the prayer of the petition, whereupon no order was made; and that a special

B. and G. carry on business at Manchester, under the firm of *Thomas B. and Co.* G. also carries on a separate business at Stockport under the firm of *G. and Co.*, and is likewise a partner with J. in another business in London, under the firm of *Thomas J. and Co.*, and in another business at Stockport, under the firm of *S. R.* The firms of *Thomas B. and Co.*, and *G. and*

(a) See vol. i. p. 44.

Co., become bankrupt. Held, that the holders of a bill drawn by *Thomas B. and Co.* on *Thomas J. and Co.*, and indorsed by *G. and Co.* and *S. R.*, were not entitled to prove it against the joint estate of *B. and G.*, and also against the separate estate of *G.*, but must elect; notwithstanding they were ignorant that *G.* was a partner in the firm of *Thomas B. and Co.*

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case had been approved and certified by one of the Judges of the Court of Review. The petition therefore prayed an early day for hearing the special case, and that the prayer of the original petition might be granted.

The special case was as follows.

“ In the Court of Review.

In the matter of *Thomas Barrow* and *George Geddes*.
Ex parte *Moult* and others.

SPECIAL CASE.

Before and at the time of issuing the commission of bankrupt hereinafter mentioned against *Thomas Barrow* and *George Geddes*, they the said *Thomas Barrow* and *George Geddes* carried on business in Manchester, in partnership, as commission agents, under the firm of *Thomas Barrow* and Company.

And the said *George Geddes* carried on the business of a cotton manufacturer at Stockport, in the county of Chester, on his own separate account, under the firm of *Geddes* and Company.

And the said *George Geddes* carried on business in Cheapside in partnership with *Thomas Johnston*, as warehousemen, under the firm of *Thomas Johnston* and Company.

And the said *George Geddes* carried on business in Stockport in Cheshire, in partnership with *Samuel Radcliffe*, as cotton spinners, under the firm of *Samuel Radcliffe*.

These different trades, in which the said *George Geddes* was engaged, may be thus exhibited:

Members.	Places.	Business.	Firms.
George Geddes } T. Barrow .. }	Manchester	Commission Agents..	Thomas Barrow & Co.
G. Geddes ..	Stockport..	Cotton Manufacturers	Geddes & Co.
G. Geddes .. } Thos. Johnston }	Cheapside..	Warehousemen.....	Thos. Johnston & Co.
G. Geddes .. } S. Radcliffe .. }	Stockport..	Cotton Spinners.....	S. Radcliffe.

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Previously to and at the time of issuing the said commission of bankruptcy, *Robert Williams, John Deacon, John Labouchere, Henry Sykes Thornton, Charles Montague Williams*, and the Honourable *John Thornton Leslie Melville*, of Birchin Lane in the city of London, bankers and copartners, were holders of a bill of exchange for the sum of 258*l.* 16*s.*, of which the following is a copy.

' £258 : 16s. 0d. Manchester, 8th July 1828.

**Three months after date pay to the order of ourselves
two hundred and fifty-eight pounds sixteen shillings,
value received. *Thomas Barrow & Co.***

To Messrs. *Thos. Johnston & Co.*

188, Cheapside, London.

Accepted, payable at Sir *William Kay & Co.'s,*
Thomas Johnston & Co.'

Indorsed, ' *Thomas Barrow & Co.*

Geddes & Co.

Samuel Radcliffe.'

The said bankers were also, before and at the time of issuing the said commission, the holders of another bill of exchange for the sum of 382*l.* 13*s.*, of which the following is a copy.

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' £382 : 13s.

Manchester, 1st August 1828.

Three months after date pay to the order of ourselves three hundred and eighty-two pounds thirteen shillings, value received. *Thomas Barrow & Co.*

To Messrs. *Thos. Johnston & Co.*

188, Cheapside, London.

Accepted, payable at Sir *Wm. Kay & Co.'s*,

Thomas Johnston & Co.'

Indorsed, '*Thomas Barrow.*

George Geddes & Co.

Samuel Radcliffe.'

Both the said bills of exchange were indorsed and delivered to the said *Robert Williams* and his copartners, for a full and valuable consideration for money paid by them.

The said *Robert Williams* and his said copartners did not, nor did either of them, before the issuing of the said commission of bankruptcy, know, believe, or suspect that the said *George Geddes* was a partner in the firm of *Thomas Barrow* and Company, or that he was a partner in the said firm of *Thomas Johnston* and Company; but believed that the said firm of *Thomas Barrow* and Company, and the said firm of *Thomas Johnston* and Company, and the said firm of *Geddes* and Company, were composed of different and distinct persons.

On the 17th day of September 1828 a commission of bankruptcy was issued against the said *Thomas Barrow* and *George Geddes*, by the description of *Thomas Barrow* of Manchester in the county of Lancaster, and *George Geddes* of Stockport in the county of Chester, commission agents, dealers, chapmen, and copartners, lately carrying on business at Manchester

aforesaid under the firm of *Thomas Barrow* and company, and which said *George Geddes* lately carried on the business of cotton manufacturer at Stockport; and the said *Thomas Barrow* and *George Geddes* were duly declared bankrupts under the said commission.

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On the 29th day of January 1828, a commission of bankrupt was issued against the said *Thomas Johnston*, by the name and description of *Thomas Johnston* of Cheapside in the city of London, warehouseman, carrying on business in Cheapside aforesaid in copartnership with *George Geddes*, under the firm of *Thomas Johnston and Company*; under which he was duly declared a bankrupt.

On the 18th day of October 1828 the said *Robert Williams* and his copartners proved under the commission against the said *Thomas Johnston* for the sum of 641*l.* 9*s.*, being the amount of the said two bills of exchange.

Before the 25th day of March 1830, two dividends, one of 2*s.* 6*d.* in the pound, and another of 2*d.* in the pound (being together the amount of 2*s.* 8*d.* in the pound) were declared under the said commission against the said *Thomas Johnston*; but had not on the said 25th day of March 1830 been received by the said *Williams* and Company, although they might have received such dividend if they had applied for the same.

On the 25th day of March 1830 the said *Robert Williams* and his copartners proved under the said commission against the said *Thomas Barrow* and *George Geddes*, against the separate estate of the said *George Geddes*, for the sum of 555*l.* 18*s.* 4*d.*, being the balance of the said two bills of exchange, after deducting from

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the amount thereof the sum of 85*l.* 10*s.* 8*d.*, the amount of the dividends of 2*s.* 8*d.* in the pound declared under the said commission against the said *Thomas Johnston*.

On the 25th day of March 1830 the said *Robert Williams* and his partners proved under the commission against the said *Thomas Barrow* and *George Geddes*, against the joint estate of the said *Thomas Barrow* and *George Geddes*, for the sum of 641*l.* 9*s.*, as a debt due to them from the said *Thomas Barrow* and *George Geddes* upon the said bills of exchange. The said bills of exchange, with other similar bills, were accepted by the said firm of *Thomas Johnston* and Company, to a much greater amount than they had received value for.

On the 25th day of January 1832 a petition was presented to the Chief Judge and the other Judges of his Majesty's Court of Review, by the assignees of the estate and effects of the said *Thomas Barrow* and *George Geddes*, stating the several matters hereinbefore set forth, or to the same effect, and praying that the said *Robert Williams*, *John Deacon*, *John Labouchere*, *Henry Sykes Thornton*, *Charles Montagu Williams*, and *John Thornton Leslie Melville*, might be ordered to elect whether they would remain creditors under their said proof against the said joint estate of the said *Thomas Barrow* and *George Geddes*, or under their said proof against the separate estate of the said *George Geddes*; and that, upon their electing to remain creditors upon one of the said estates, their proof upon the other of the said estates might be expunged; and in case they should elect to remain creditors upon the said joint estate of the said *Thomas Barrow* and *George Geddes*, then that the amount of their proof upon that estate might be reduced by the sum of 85*l.* 10*s.* 8*d.*, being the

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amount of the dividends declared under the said commission against the said *Thomas Johnston*, upon the proof made under the said commission against him by the said *Robert Williams* and his copartners of the said bills; and in case they should refuse to make such election, then that both the said proofs might be expunged.

On the 20th day of February 1832, the said petition came on to be heard before the Chief Judge, and the other Judges of the said Court of Review; when their Honours the said Chief Judge, and the other Judges, were equally divided in opinion upon the question, whether such election ought to be made by the said *Robert Williams* and his said copartners, as prayed in the said petition; or whether they were entitled to the benefit of the said proof against the joint estate of the said *Thomas Barrow* and *George Geddes*, and also to the benefit of the said proof against the separate estate of the said *George Geddes*.

And an order was made upon the said petition, whereby it was ordered, that the said proof of the said *Robert Williams* and his copartners, against the joint estate of the said *Thomas Barrow* and *George Geddes*, should be reduced by the sum of 85*l.* 10*s.* 8*d.*; and upon so much of the said prayer of the said petition, as sought to compel the respondents to elect as to which of their said proofs they would abide by, their Honours did not make any order.

The questions are,

“ 1. Whether the said *Robert Williams* and his said copartners are bound to elect against which estate they will prove, as between the joint estate of the said *Thomas Barrow* and *George Geddes*, and the separate

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estate of the said *George Geddes*; or whether they are entitled to the benefit of the said proof against the joint estate of the said *Thomas Barrow* and *George Geddes*, and also of the said proof against the separate estate of the said *George Geddes*, without being put to any election.

2. Whether the said proof of *Williams* and Company against *Barrow* and *Geddes* should be reduced to 55*l.* 18*s.* 2*d.*, or their proof against *Geddes* increased to 64*l.* 9*s.*, in respect of the amount of *Johnston's* dividend."

Sir *Edward Sugden* and Mr. *Wigram* for the appellants. The question which the Court has to determine on this appeal is, whether these bankers have a right to prove against both the joint and separate estates. Now the rule in bankruptcy is, that the joint estate shall be applied to pay the joint debts, and the separate estate to pay the separate debts. There is no instance of double proof being allowed at variance with this rule. It is contended on the other side, that all learned judges, as well as Sir *Samuel Romilly*, have disapproved of this rule; but their expressions of disapprobation only serve to prove the existence of the rule. Like the canon of descents which excludes the half blood from the inheritance (a), the rule is disapproved of; but it must prevail, until it is altered by the legislature. The rule, it is true, deprives the creditor of part of his common law right, if his debtor becomes a bankrupt; for the common law confers a priority upon the diligence of the creditor. But priority cannot exist in bankruptcy; and it is for that reason a rule has been framed, with a

(a) Sir *W. Blackstone* says, that those who disapprove of this rule, are unacquainted with the reasons on which it is founded. See 2 *Bl. Com.* 220.

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view to distribute the assets with perfect equality among the creditors. Thus if I contract for a joint and separate liability, I cannot have them both in bankruptcy; although, at law, a creditor upon such a contract may take both joint and separate property in execution. The reason is, that in bankruptcy the fund of the debtor is no longer open to the diligence of the creditor. All litigation is at an end, and the assets must be divided equitably,—the joint fund to those who have looked to it for security,—and the separate, to the creditors who have trusted the individual partner.

It is admitted on the other side, that where several partners constitute one firm, there cannot in such case be a double proof. And we admit, also, that where the firms are distinct, and a person not knowing they are in any way connected, deals with them and takes the security of both, he may in that case prove against both estates. But those are cases in which each of the firms constitutes a *joint* estate, or where there is an *additional partner*. There is no case, where one individual constitutes a nominal firm, and is at the same time a partner in another firm, in which double proof has been allowed.

But then they contend, that there should be double proof in this case, because *Geddes* carried on a separate trade, and Messrs. *Williams* and Company had no notice of his connection with the other partners; and it is asked, who is to have the benefit of the fraud and concealment of the bankrupt, in not disclosing to the creditors the actual state of the partnerships? Not the bankrupt, it is urged. But we say, that the bankrupt has nothing to do with it; the contest being not between the bankrupt and his creditors, but between two

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particular classes of creditors; and the fraud of the bankrupt cannot affect the relative rights of the creditors *inter se*.

In order to explain *Ex parte Blackburn* (a), it has been said, that by proving against one estate, you elect to abandon the other. But how can that be, if I had an original right against both estates? Election can only arise, where a party has a right against one only. According to this argument, if *A.* devise his real and personal estate to *B.*, and *B.* takes the personal estate first, he forfeits his claim to the real.

Next, it is said to be the rule, that where *C.* and *D.* are partners with *A.* and *B.*, the joint estate of *C.* and *D.* will go over to the joint estate of *A.*, *B.*, *C.* and *D.* We deny the existence of any such rule. If I am a partner in 20 joint estates, the surplus of my estate, after paying joint debts, goes over to my own separate estate. The joint estate of one partnership is never liable to the joint engagements of another.

With respect to the authorities that may be cited in support of our argument, *Ex parte Husbands* (b) is decisive of the question; the very point has been raised, argued and decided in that case. Sir *A. Pell*, in observing upon that case in his judgment in the Court of Review (c), says, that the rule we contend for is both arbitrary and unreasonable, and seems to think that it is not warranted by any principle of law. But you cannot act in bankruptcy, as you would in law; for all competition is stopped by the commission, which prevents any creditor from claiming a priority. Sir *J. Cross*, too, in his remarks upon that case (d), says, that the cre-

(a) 10 Ves. 204.

(b) 2 G. & J. 4.

(c) 1 Dea. & C. 65.

(d) 1 Dea. & C. 69.

ditor there "took a bill drawn by a trader upon a dormant partner, and on the bankruptcy of both partners, the creditor then knowing of the partnership, proved the bill against the joint estate." But the knowledge at the time of the bankruptcy is nothing; the question is, what did the creditor know at the time of the taking of the bill? In the report of the case of *Ex parte Husbands* in Maddock's Reports (a), it appears that the prayer of the petition was, that the creditors might prove against both the separate estates, as well as the joint estate,—or that they might be at liberty to elect to transfer their proofs from the joint to the separate estates. At the *hearing* the double proof was abandoned. In the same case on appeal to the Lord Chancellor (b), the petition of appeal asks also for double proof. It was there contended by Mr. *Montagu* and Mr. *Rose* for the appellants, that the petitioners, being ignorant that the drawer of the bills was a partner in the firm represented by the acceptance, were entitled to double proof; that knowledge of the fact, after they took the securities, was immaterial; that the discovery of the dormant partner, gave a right to proceed against both partners; and proceeding against both could not affect their right as against the separate estate of the acceptor, to which they had given credit. But Lord *Eldon*, in giving judgment in that case, says; "It does not appear to me that this case ranges itself within that class of cases, in which, contrary to the ordinary rule in bankruptcy, the holder has been allowed to pursue the contract appearing on the face of the bills, and to have double proof."

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With respect to the question of the party being a

(a) 5 Madd. 419.

(b) 2 G. & J. 4.

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trader, Lord *Eldon* says in *Ex parte The Bank of England* (a), "In all cases in which the holder has been allowed to avail himself of his security to the extent of its apparent liability, there had either been an ignorance of the union of the parties in one partnership, or a subdivision of them into distinct trading establishments. Unless, therefore, this case could stand upon the circumstance of *Fisher* being a distinct trader, it could not stand at all; and that circumstance resolves itself into nothing more than a resort to his separate estate, which, resorting at the same time to the joint estate, a creditor was not entitled to in bankruptcy. The petitioners therefore must elect." This case decides, that the circumstance of merely one of the partners being a separate trader, makes no difference. Unless he be such a separate trader, the question could not arise, and that which merely raises the rule cannot decide it.

Not one of the remaining cases touches the question. *Ex parte Laforest* (b) was a partnership of four persons, two of whom were engaged in a separate trade, and the other two in another separate trade. One of the minor firms accepts bills drawn by the other; and the holder of a bill, having no knowledge that these two minor firms composed one aggregate firm, was allowed to prove against the joint estates of the different firms.

The case of *Ex parte Benson* (c), Sir *J. Cross* says, in his judgment in the Court of Review, decides the point in this case. But no two cases can be more different than that and this. In *Benson's* case three persons were engaged in one partnership, and two of them in another distinct trade. The other partner drew a bill which was indorsed by these two; the holder of the bill,

(a) 2 Rose, 82.

(b) 1 C. B. L. 261.

(c) Ibid. 263.

being ignorant that the three persons were connected in one partnership, was permitted to prove against the joint estate of the two, and the separate estate of the other.

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In *Ex parte Bigg* (a), and *Ex parte The Bank of England* (b), it is sufficient to say, that the proof was refused. There is not a word in any of these cases, that can support the position contended for by the other side. In all the cases, Lord *Eldon* uniformly winds up his judgment by reiterating the rule. Thus, in *Ex parte Benson* (c), he says, "The principle seems obvious; yet in bankruptcy, for some reason not very intelligible, it has been said the creditor shall not have the benefit of the caution he has used. I never could see why a creditor, having both a joint and a several security, should not go against both estates; but it is settled that he must elect." In *Ex parte Bigg*, the party was not a distinct trader; in *Ex parte The Bank of England*, he was.

Ex parte Adam (d) is the only case that remains to be noticed. There five partners, trading under one firm, drew a bill on two of the members of the partnership, who carried on a distinct trade under another firm; and the holder of the bill, being ignorant of any connection between these different firms, was permitted to prove against the joint estate of the five, and the joint estate of the two. Lord *Eldon*, in giving judgment in that case, says (e), "Here being an express bargain for double security, the parties are, I think, entitled to it, the houses being distinct; therefore this is not within the rule of election, where five jointly and

(a) 2 Rose, 37.

(b) Ibid. 82.

(c) 10 Ves. 109.

(d) 1 Ves. & B. 493; 2 Rose, 36.

(e) 1 Ves. & B. 496.

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severally contracted, but not as persons engaged in different houses and trades." The joint estate of the two, in that case, was not the same estate as that of the five; for the surplus would go over to the separate estate of each individual partner. It is not therefore a *double proof* against the *same* estate. But in all cases, like this before the Court, the proof would be *double* against the *same* estate; there would be a competition between the joint and separate creditors of the same person. This would be quite contrary to the acknowledged rule in bankruptcy,—that you cannot go against the same individual upon a joint and separate security, and that there can be no competition between joint and separate creditors.

Mr. *Montagu* for the respondents. In cases of this nature, there are two rules in regard to proofs; the one relating to *election*, and the other to *double proof*. These rules, though perfectly distinct, have been so confused, as to occasion some apparent difficulty, where none really exists.

With respect to *election*, the rule is, that where a creditor has a joint and separate security, he must elect whether he will prove against the joint or separate estate, if he knew, when he accepted the security, that the separate debtor was also one of the joint debtors. *Ex parte Rowlandson* (a), *Ex parte Bond* (b), *Ex parte Parminter*, *Ex parte Abingdon*, and *Ex parte Banks* (c), *Ex parte Blankenhagen* (d), *Ex parte Butten* (e), *Ex parte Close* (f), *Ex parte Hay* (g), *Ex parte Masson* (h).

(a) 3 P. Wms. 405.

(b) 1 Atk. 98.

(c) Cited in *Ex parte Bond*.

(d) 1 Cooke, 264.

(e) Ibid.

(f) 2 Brown, 596.

(g) 15 Ves. 4.

(h) 1 Rose, 160.

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The principle on which this rule is founded is, the supposed analogy to proceedings at law, where a joint and several creditor cannot maintain both a joint and separate action against his debtors. But this supposed analogy fails to support the rule. For though a creditor at law cannot bring a joint action, and also separate actions against the parties bound to him on a joint and several security, yet he may sue out execution in a joint action both against the joint and separate effects of the defendants. The inability, therefore, to sue the parties jointly as well as separately, does not deprive the creditor of his double remedy against the joint and separate property of his debtors,—but is intended to prevent the creditor from harassing each of his debtors with two actions, when he can attain his object by one. Lord *Thurlow* always viewed the matter in this light, and thought that a joint creditor ought not to be deprived of his right to enforce judgment under a statutable execution, in the same mode as he would have been entitled under a common law execution, by proceeding against both the joint and separate estates of his debtors: *Ex parte Cobham* (a), *Ex parte Heyden* (b), *Ex parte Hodgson* (c), *Ex parte Page* (d), *Ex parte Hinton* (e), *Ex parte Copland* (f). Lord *Eldon*, too, upon several occasions (g), expressed his disapprobation of the rule in bankruptcy that prevents a creditor, having both a joint and several security, from going against both estates. The only intention, in referring to this rule respecting *election*, is, to show that the Court has never been disposed to extend it.

(a) 1 Bro. 576.

(b) 1 C. B. L. 254.

(c) 2 Bro. 5.

(d) 2 Bro. 119.

(e) Ibid. 120.

(f) 1 C. B. L. 236.

(g) *Ex parte Bevan*, 9 Ves. 223; 10 Ves. 117.

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In regard to *double proof*, the rule is this. The holder of a bill drawn by one firm upon another distinct firm, consisting partly of the same members, is entitled to prove against both estates, if the holder took the bill without notice that the two firms consisted partly of the same members. To show that this is the rule, it will be necessary to consider, 1st, the cases; 2dly, the *dicta*; and 3dly, the principle on which they are founded.

1st, As to the cases. In *Ex parte Laforest* (a), *A. Corson* and *R. W. Johnson* carried on business at Brentford as apothecaries. *Corson* was also a partner with *J. Gordon* in a distillery; and *Corson* and *Gordon* were likewise engaged in partnership with *Whincup* and *Griffin*, as soap manufacturers. There were thus three distinct houses of trade, and the firms were "*Corson and Johnson*," "*Corson and Gordon*," and "*Whincup and Griffin*." *Corson* and *Gordon* drew a bill payable to their order on *Whincup* and *Griffin*, for 253*l.* 2*s.* 4*d.*, which was duly indorsed and accepted; and it was discounted by *Laforest*, who did not know of any partnership between *Corson* and *Gordon*, and *Whincup* and *Griffin*. Lord *Loughborough* ordered that the Commissioners should inquire whether the petitioner, at the time of taking the bill, knew that *Corson* and *Gordon* and *Whincup* and *Griffin* were concerned in one partnership; and if he did not know it, then that he might prove against the respective joint estates of *Corson* and *Gordon*, and of *Whincup* and *Griffin*. In that case, then, the two requisites concurred, to entitle the bill-holder to double proof,

(a) 1 C. B. L. 266.

namely, two distinct firms, and want of notice that there was any connection between them.

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In *Ex parte Benson* (a), the bankrupts *B. Marsh*, *W. Hoghton*, and *J. Hoghton*, were partners in a cotton manufactory, and *W.* and *J. Hoghton* were also engaged in a separate business as grocers. *W.* and *J. Hoghton* remitted to the petitioner a bill drawn by *B. Marsh* in their favour upon one *Addis*; the petitioner being ignorant that *B. Marsh* had any connection in trade with the *Hoghtons*. And it was ordered, that the petitioner should be admitted to prove both against the joint estate of *W.* and *J. Hoghton*, and the separate estate of *B. Marsh*. The two requisites, of distinct firms, and want of notice, also concurred in this case.

In the next case of *Ex parte Adam* (b), five persons, trading together under the firm of *Cooke & Co.*, drew a bill on two of the partners, who carried on a distinct trade under the firm of *Harrison and Goss*. The bill came into the hands of the petitioner, without any knowledge on his part of the connection between the parties. And on this ground Lord *Eldon* held, that he was entitled to prove against both estates. Here again, it will be observed, there were two distinct firms, as well as want of notice on the part of the bill-holder.

In *Ex parte Bigg* (c) there were also five persons trading under the firm of *Harrison & Co.*, of which firm *Samuel Cooke* was one. *Cooke* drew a bill upon *Harrison & Co.*, which they accepted; and the holders, who were *Cooke's* private bankers, discounted the bill for him. *Cooke*, however, was not a distinct trader, and the bill-holders were not ignorant that *Cooke* was included in the firm of *Harrison & Co.* Lord *Eldon* therefore held, that

(a) 1 C. B. L. 65.

(b) 2 Rose, 36.

(c) Ibid. 37.

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in this case the holders of the bill were not entitled to double proof.

In *Ex parte The Bank of England* (a), three persons trading under the firm of *Graves, Sharp, and Fisher*, indorsed a bill over to *Fisher*, one of the partners, who was also a distinct trader, and kept a separate account with the Bank, where *Fisher* discounted the bill and indorsed it. The Bank *knew of the partnership* of the parties, but refused to discount the bill, unless *Fisher* also indorsed the bill in his separate capacity. And Lord *Eldon* gave also a similar judgment in this case, namely, that the Bank were not entitled to prove against both estates, but must elect (b).

In *Ex parte Walker* (c), four persons, *Ford, Price, Cross, and Gilbert*, were jointly interested in a cargo, *Ford* being a rope-maker, and *Price* and *Cross* ship-brokers. *Ford* drew a bill on *Price* and *Cross* in favour of *Wensley & Co.*, the consideration for which was goods supplied for the joint adventure, in which the payees knew the parties to be jointly interested. It was contended here, that this was not a bill of one partner upon the firm, but one of several partners drawing upon two other partners, a distinct house, and therefore clearly establishing a double security. And Lord

(a) 2 Rose, 82.

(b) The distinguishing feature of the case of *Ex parte The Bank of England*, and the distinction also, which was mainly relied upon in argument, was, that the Bank, previous to discounting the bill, according to their usual practice, required the individual indorsement of *Fisher*, the person discounting it with them, and thereby raised a contract for double security. But Lord *Eldon* thought, that the practice of the Bank did not vary the nature of the bill from what it substantially was, namely, a joint and several security; which, in bankruptcy, was confined to a right of election against the joint or the separate estate.

(c) 1 Rose, 441.

Eldon assented to the distinction, and allowed the double proof against the separate estate of *Ford*, and the joint estate of *Price* and *Cross*.

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In *Ex parte Liddel* (a), three persons, *Hitchcock*, *Groves*, and *De Prado*, traded at Hull under the firm of *Groves & Co.*, one of whom, *De Prado*, resided in London. *Keys* received a bill for goods sold to the firm, drawn by *Groves & Co.* upon *De Prado*, being ignorant that *De Prado* was one of the firm. *Groves* being a minor, separate commissions issued against *De Prado*, and against *Hitchcock*, and an order was made under each commission for keeping distinct accounts of the joint and separate estate. *Keys* took advantage of this order, by proving against the *joint* estate under *each* commission; insisting upon such proof, not by force of the contract upon the bill,—which would have entitled him to prove against the joint estate, and also against the separate estate of *De Prado*,—but of the contract by operation of law, either including or rejecting a dormant partner. He claimed afterwards to prove against the separate estate of *De Prado*. But Lord *Eldon* said, that as he had “modelled his proof upon the right which the law gave him, either of confining his claim to the visible members of a partnership, or of extending it to the dormant, he had made a deliberate and conclusive election. Adopting the aggregate liability of all his debtors, he is excluded now from resorting to them individually” (b).

(a) 2 Rose, 34.

(b) It is very difficult to reconcile this decision of Lord *Eldon*’s with his subsequent decision in *Ex parte Adam*, 1 Ves. & B. 493; (see *ante*, p. 431, 435;) and he himself seems to have expressed some doubt in that case, whether he correctly applied the principle, on which the rule of election of proof is founded, to the facts of the case of *Ex parte Liddel*. *Keys*, it appears, sold

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In the remaining case of *Ex parte Husbands (a)*, J. and P. Blackburn carried on the business of *shipbuilders*, at *Plymouth*, under the firm of "*Isaac Blackburn*," and drew a bill in that name or firm on P. Blackburn, who carried on the separate business of a *merchant* in *London* in his own name. The bill-holder knew not, when he took the bill, that *Isaac* and *Peter* were in partnership; but he knew it, before he proved against the joint estate, under a joint commission issued against them. He petitioned afterwards to prove against the separate estate of *Peter*, in addition to his joint proof. The Vice-Chancellor thought he had no right to do so, on the ground that he had made a conclusive election to prove against the joint estate (b). And Lord Eldon, on appeal, says, "It does not appear to me, that this case ranges itself within that class of cases in which,

goods to *Groves & Co.*, not knowing that *De Prado* was a secret partner; he had, therefore, upon his mere contract for goods sold and delivered, a right to prove either under the joint or the separate estate. But he takes a bill for the amount drawn by *Groves & Co.* upon *De Prado*, being still ignorant that *De Prado* was a partner in the house of *Groves & Co.* Why should he therefore, by proving first against the joint estate of the drawer, be held to have "made a deliberate and conclusive election," and to have waived his right of double proof, given by the law of bankruptcy to every creditor who takes a bill drawn by one firm upon another, without notice of any connection between the firms? The same reasoning would apply to every case where the bill-holder is ignorant of the partnership between different parties to a bill, and chooses to prove against the joint estate of the aggregate firm, before he exercises his right of proving against the estate of the minor firm.

(a) 5 Madd. 419; 2 G. & J. 4.

(b) According to *Ex parte Enderby*, 2 B. & C. 389, and *Smith v. Watam*, *ibid.* 401, the partnership property of J. and P. Blackburn would now, under the circumstances of the above case, be considered as in the order and disposition of *Isaac Blackburn*, and forming part of his separate estate. Proof, therefore, against the separate estate of the only ostensible partner, would now give the creditor the same benefit as a proof against the joint estate.

contrary to the ordinary rule in bankruptcy, the holder has been allowed to pursue the contract appearing on the face of the bill, and to have double proof." (a)

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These are the cases where the point has been decided. I come now to the *dicta* on the subject.

In *Ex parte Bonbonus* (b), Lord Eldon says, "There have been many cases, particularly in the bankruptcy of *Burton, Forbes, and Gregory*, where three or more parties being also concerned in other trades, the paper of one firm was given to the creditors of another; and they were permitted to take dividends from both estates."

In *Ex parte Husbands*, already cited, Lord Eldon says, "It is clear, that where a party takes a bill, drawn by some members of a firm, carrying on a distinct trade, on the firm, in ignorance that the drawers constitute part of the firm of the acceptors, proof is admitted against both the drawers and acceptors." This, then, is the rule established on the authority of all the cases.

It is not, however, merely upon decisions, and *dicta*, that the rule is established, but it is founded also upon principle. For when a creditor, taking a bill from his debtor, has been misled by the concealment of facts, with which, if he had been acquainted, he would probably not have taken it, it is not the creditor, but the debtor, who should suffer.

In *Ex parte Sillitoe* (c), Lord Eldon says, "I well remember the case of *Shakeshaft, Stirrup, and Salis-*

(a) In this case of *Ex parte Husbands*, there was certainly nothing appearing on the face of the bill to induce the holder to suppose, that any other parties were liable to him than *Isaac Blackburn* and *Peter Blackburn*, in their separate and individual characters. This was, therefore, the only contract which, by virtue of the bill, the holder had a right to pursue.

(b) 8 Ves. 546.

(c) 1 G. & J. 383.

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bury. There were four or five persons in a partnership; some of them carried on business at Liverpool, some in other places; and the creditors would take it for granted they were different firms, though, in point of fact, they were so many wheels of one machine. Another relaxation of the rule (a) was therefore admitted, that where there is a demand arising from a dealing by the partnership in a distinct trade, proof might be admitted." Where, indeed, the holder is aware of the identity of the parties when he takes the bill, then what Lord *Eldon* says in *Ex parte Bigg* (b) confirms the principle on which the rule is founded. "Where the object appears," he says, "to give the bill a character of respectability, by such distribution of the names of a partnership, the Court has said, that the parties to such an arrangement shall not avail themselves of it, against their knowledge of the method in which the obligation of the firm ought regularly to be created."

Having now considered the *decisions* and *dicta*, as well as the *principles*, on which the rule is founded, let us apply the rule to the present case. The bill in this case was drawn by *T. Barrow & Co.*, and indorsed *G. Geddes & Co.*, the holder being in perfect ignorance that *Geddes* was a member of the firm of *T. Barrow & Co.* Here, therefore, both the requisites concur: 1st, distinct houses of trade; 2dly, no knowledge of the bill-holder, that the members of the different firms were

(a) The rule there alluded to by Lord *Eldon* is not the rule which is the subject of the argument in this case; but another rule in bankruptcy, "that a partner in a firm, against which a commission of bankrupt issues, shall not prove in competition with the creditors of the firm."

(b) 2 Rose, 37.

in any way connected. It seems extraordinary, then, that there should have been a difference of opinion among the judges in the Court of Review upon this subject; which it will now become necessary to investigate.

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The Chief Judge says, that “the rule appears to have been first laid down by Lord *Talbot*, in *Ex parte Rowlandson* (a), where the question arose upon a joint and several bond; and it was held, by analogy to the common law, that the creditor must elect.” But his Honour here refers, not to the rule as applicable to double proof, but to the rule in cases of election, which is not applicable to the present case. His Honour thinks, that the cases of *Ex parte Laforest* (b), *Ex parte Benson* (c), *Ex parte Walker*, and *Ex parte Wenslay* (d), are not applicable to this case,—on the ground that they were not cases of double proof against the same party, but rather of distributive proof against the different members of one partnership; and that the attempt made here is, to prove the same debt twice against the same party. But in *Ex parte Laforest* the proof was ordered against the joint estate of *Corson* and *Gordon*, and against the joint estate of *Whincup* and *Griffin*, which firm consisted partly of *Corson* and *Gordon*; and it was ordered, only, on the ground that there were two distinct firms, which the bill-holders did not know were connected with each other. In the present case, we seek to prove against the joint estate of *T. Barrow & Co.*, the acceptors, and also against the estate of *G. Geddes*, the indorser, for the same reasons, namely, because the firms are different, and the petitioner had no notice that the persons composing them

(a) 3 P. Wms. 405.

(b) 1 C. B. L. 266; ante, 434.

(c) 1 C. B. L. 268; ante, 435.

(d) 1 Rose, 441; ante, 436.

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were the same. So, in like manner, in *Ex parte Benson* (a), the proof was ordered against the joint estate of *W. and J. Hoghton*, and against the separate estate of *B. Marsh*; because there were two firms, and the same want of notice on the part of the bill-holders. So, also, in *Ex parte Walker* and *Ex parte Wenslay* (b), the proof was ordered against the separate estate of *Ford* the drawer, and the joint estate of *Price* and *Cross* the acceptors; because, as *Ford* and *Price* and *Cross* carried on separate trades, *that* was held to establish a case of double security, notwithstanding the bill-holder knew that those three persons were interested with another person in a joint adventure. It seems difficult, therefore, to understand what is meant by these being cases of distributive proof against different members of the same partnership; as in each of these cases there were more partnerships than one.

Then, as to what his Honour says, that the proof here proposed to be made is twice against the same party; the answer is, that the application is not to prove twice against *T. Barrow & Co.*, or twice against *G. Geddes*; but once against *T. Barrow & Co.*, and once against *G. Geddes*.

His Honour adds, that the only case, to support such right of proof as we here contend for, is, *Ex parte Adam* (c), and that the proof there was against two joint estates, and not against a joint and a separate one. Now, in that case the proof was ordered against the estate of the four partners, and against the estate of two of the firm of the four carrying on a distinct trade. So here, the proof that is claimed is against the estate of the two, and also against the estate of one of the

(a) *Ante*, 436.(b) *Ante*, 436.

(c) 1 V. & B. 493.

firm of the two carrying on a distinct trade. The only difference is in the number of persons engaged in the aggregate and minor firms; but the principle is the same.

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His Honour then refers to *Ex parte Bigg* (a), but says, that the circumstances of that case do not furnish grounds applicable to this; because there, *although the trade was distinct*, the creditor knew of the connexion. There seems to be some mistake either in his Honour's statement, or in the report of his Honour's judgment (b); because in the report of *Ex parte Bigg* it is expressly stated, that *Cooke was not a distinct trader*; which explains the observation made by Lord Eldon in the conclusion of the report, as a reason why there should not be a double proof.

His Honour then mentions the case of *Ex parte The Bank of England*, where he says, "the party to the bill was a distinct and separate trader, yet he was held not to be entitled to double proof." But that case was clearly not within the rule admitting the right of double proof; because the bank knew that *Fisher* was a member of the firm of *Graves, Sharp, and Fisher*.

His Honour then says, "I do not propose to rest my judgment on that distinction, but upon the rule of prac-

(a) 2 Rose, 38.

(b) In the report of his Honour's judgment in *Ex parte Moulton*, as given in 1 Dea. & C. 61, the following is the passage that relates to his notice of *Ex parte Bigg*:—"The next case is that of *Ex parte Bigg*, and is one of a separate security by an individual partner. But the circumstances of that case do not furnish a decisive answer to the question; for there the drawer of the bill was not a distinct trader, and the creditor knew of the connexion of the parties; whereas the holder's ignorance of that fact was dwelt upon by the Chancellor in *Ex parte Adam*, as the ground of his judgment. At the same time it must be observed, that Lord Eldon's language in *Ex parte Bigg* points directly to the distinction taken by Mr. Wigram."

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tice, which is said to be arbitrary, and not depending upon reasoning; and that it is in vain to look to reasoning for the extent of the rule, or the exception; that the practice limits the rule and the exceptions." This, I confess, I do not understand (*a*): there is, what has been called an arbitrary rule; but it is not called so, in regard to the rule as to double proof, where the debtor has misled the public; but to the case where a debtor gives a bill to his creditor, the creditor knowing that the different parties to the bill are members of the same firm.

The Chief Judge in conclusion says, "the case of *Ex parte Husbands* (*b*), is decisive. The creditor was there ignorant of the connexion of the parties; yet Sir *J. Leach*, and Lord *Eldon*, although they differed on some points, agreed that the double proof could not be allowed." But, upon referring to the judgment of the Vice-Chancellor in 5 *Madd.* 419, it will appear, that the only reason for his judgment was, that the application was too late; and upon referring to the judgment of Lord *Eldon* in 2 *G. & J.*, it will appear, that he also

(*a*) In 1 *Dea. & C.* 62, the language which his Honour uses in noticing this rule of practice, is as follows:—"But it would be vain to attempt to settle, by reference to principle, the exceptions to a general rule admitted to be arbitrary, and to have no sound principle to rest upon. The practice which has established the rule must also settle its limits." The rule which his Honour here alludes to is evidently the rule mentioned by him in the previous part of his judgment, namely, that a joint and separate creditor must elect whether he will prove against the joint or separate estate, and that he cannot prove against both. The cases where double proof is admitted, on the ground of distinct firms, and the bill-holder's ignorance of any connexion between them, the Chief Judge treats as an exception to the rule; while Mr. *Montagu* in his argument ranges them under another and independent rule, defining the right of double proof. This may explain some apparent ambiguities in his argument where he talks generally of the rule.

(*b*) 5 *Madd.* 419, 2 *G. & J.* 4; *ante*, 438.

thought it was too late to alter the election which the creditor had made (a).

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: Sir *G. Rose* concurred in opinion with the Chief Judge; and after distinguishing the different rights of creditors proceeding at law, and proceeding under a commission, his Honour says, “when they tender their proof under the commission, they withdraw their debt voluntarily from the legal operation of the contract, and submit it to be regulated by the principles upon which assets are administered in bankruptcy.” The question is, then, upon what principles are assets administered in bankruptcy? I say, that where a creditor, as in this case, takes a bill drawn by *Barrow and Co.* agents at *Manchester*, and indorsed by *Geddes and Co.*, cotton manufacturers at *Stockport*, in ignorance that *Geddes* was a member of the firm of *Barrow and Co.*, he is entitled; according to all the cited cases, to prove against both estates.

After some observations upon the rights of the joint creditors to the joint estate; and of the separate creditors to the separate estate, Sir *George* then asks, “what difference can the circumstance, that *Geddes* is a separate trader, make, unless the law, or equity, or bankruptcy, distinguishes his separate trading stock, as a distinct recognised stock, from his general assets?” This, however, is not the mode in which the question was considered by Lord *Thurlow*; for in *Ex parte*

(a) Lord *Eldon* did not think that the creditor was bound by his election, though he disallowed his claim of *double proof*; for in the concluding part of his judgment he says, “I do not think that the petitioners are concluded by any thing that has passed, so as to be prevented now from *withdrawing the proof against the joint estate, and being admitted as creditors on the two separate estates.*”

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Benson (a), the minor firm, which was composed of two of the members of the major firm, carried on the business of *grocers*, which was a distinct trade from that of *cotton manufacturers*, in which the major firm was engaged; and Lord *Thurlow* ordered that the bill-holder, having no notice of any connexion between the firms, might be paid a dividend out of the joint estate of the two, and also out of the separate estate of the third partner, who composed with the two the major firm. This decision is founded on a just and right principle; for when a bill drawn by one firm upon another is negotiated in the commercial world, the holder naturally looks to both houses for the payment of it; and he is entitled to do so, unless he knew that the drawers and acceptors were connected in partnership; in which case he takes the bill, subject to the rule in bankruptcy, that he must elect against which estate he will claim the amount. The holder of the bill, in this case, is not to be prejudiced, because there is a second deception practised upon him by one of the parties, in using the firm of *Geddes* and Co., which firm comprised no other persons than *Geddes* himself. If *Geddes* and Co. had been *Geddes* and *Thompson*, then it is admitted by the other side, that the holder would have been entitled to prove against this estate of *Geddes* and *Thompson*, and the separate creditors of *Geddes* would have been excluded from competing with the bill-holders. Is, then, the bill-holder to be deprived of his right, on account of this second falsehood, and to be put in a worse situation, by being made to share merely with the separate creditors of *Geddes*?

Sir *G. Rose* proceeds to say, that “no case has been

(a) See *ante*, 435.

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cited that affects the rule, that you cannot prove against both the joint and separate estate of the same individual." But the case of *Ex parte Benson* (a), and the principle upon which it was decided, are in direct opposition to this *dictum*. Sir George then adds, "from the first to the last of Lord Eldon's judgments, from that of *Ex parte Bigg* (b), down to the last case of *Ex parte Husbands* (c), this principle is established; and in the last case, if Lord Eldon had thought otherwise, he would have directed the proof against the joint and the separate, instead of the two separate estates." But in *Ex parte Bigg*, the partner who drew upon the firm was not a distinct trader, and therefore the rule as to double proof did not apply; a distinction expressly taken by Lord Eldon in his judgment. In the present case, however, there are *distinct firms*, carrying on *distinct trades*, residing at *distinct places*, and having *distinct and recognised stocks in trade*. And as to the observation on the case of *Ex parte Husbands*, it is unnecessary to speculate upon what Lord Eldon's judgment would have been, if he had thought differently in that case; because that was a case *strictissimi juris*, where a creditor, having a right of election as to his proof, was not allowed to waive the election he had once deliberately made. But, even if the creditor there had insisted upon his right on the face of the bill, in the first instance,—it could only be to prove against the separate estate of *Isaac Blackburn*, and the separate estate of *Peter Blackburn*. Sir George then goes on to say, that "it could make no difference whether the firm was

(a) 1 C. B. L. 268; ante, 435.

(b) 2 Rose, 87; ante, 435.

(c) 5 Madd. 419, 2 G. & J. 4; ante, 438.

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Blackburn only, or *Blackburn* and Co.; for that the legal result would be precisely the same in all its incidents." It makes this difference, however, that if the bill had been drawn by *Blackburn* and Co., it would then have expressed that the estate of *Blackburn* and Co. would be liable; but as the name of *Isaac Blackburn* alone appeared on the face of the bill, then his separate estate (unless indeed in the case of fraud) could only be declared liable.

His Honour then, adopting the *argumentum crucis*, says, "Let us try all the cases by that of *Ex parte Walker* (a). Now, the proof there was ordered against the separate estate of *Ford* the drawer, and the joint estate of *Price* and *Cross* the acceptors, for this plain reason,—that *Ford* carried on a separate trade, and was not a member of the firm of *Price* and *Cross*.

But an imaginary case is then stated by his Honour, namely, that if *A.* draws on *A.*, *B.*, *C.* and *D.*, the bill could not be proved against *A.*, and also against *A.*, *B.*, *C.* and *D.*; because it would give to the creditor, twice over, payment out of funds in which *A.* was interested. In answer to this, it is sufficient to say, that it is directly opposed to all the authorities. Thus in *Ex parte Laforest* (b) there was one proof ordered against *Corson*, *Gordon*, *Whincup*, and *Griffin* (c), and another against the estate of *Corson* and *Gordon*; so that it is clear, in this case, that *Corson* and *Gordon* were interested in both funds. So also, in *Ex parte*

(a) 1 Rose, 441; ante, 436. (b) 1 C. B. L. 266; ante, 434.

(c) In *Ex parte Laforest* Lord Loughborough did not order any proof against the aggregate joint estate of *Corson*, *Gordon*, *Whincup*, and *Griffin*, but merely "against the respective joint estates of *Corson* and *Gordon*, and of *Whincup* and *Griffin*."

Adam (a) one proof was against the estate of the aggregate firm of *Cooke & Co.*, which comprised *Cooke*, *Harrison*, *Goss*, and two other persons,—and another proof against *Harrison* and *Goss*; in both of which funds, of course, *Harrison* and *Goss* were interested.

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For these reasons, I contend that Messrs. *Williams & Co.* are entitled to retain their proof against the joint estate of *Barrow* and *Geddes*, and also against the separate estate of *George Geddes*.

Cur. adv. vult.

LORD BROUGHAM, C.—I have considered the case of *August 4.*
Ex parte Moulton, and the arguments which have been urged on both sides. The reason given by one of the learned Judges in the Court below, for his opinion that there should be a double proof, namely, “that the rule which excludes the proof rests upon arbitrary doctrine, not founded in law or justice,” appears to me, not to warrant the conclusion at which he arrives. For, if it be a rule, whether arbitrary or not, and the Courts have acted upon it for a length of time, it has become the law of the Court, whatever may have been its origin; and it consequently assumes the character of a statutory enactment. I am therefore inclined to agree with the Chief Judge and Sir *G. Rose* in their opinions, and think the Court is bound by the rule as laid down in *Ex parte Husbands*. If there is any difficulty as to the form of the order, the terms of it must be settled before me. The question as to the return of the dividends (b) has been disposed of in the course of the

(a) 2 *Rose*, 36; *ante*, 435.

(b) This part of his Lordship’s judgment, which relates to the return of the dividends, appears to be rather ambiguous. There is no statement in

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argument. As to what remains, the order will be, that the creditors do elect.

The Order drawn up was, that the dividends should be returned, that the appellants should elect against which estate they would prove, and that the costs should come out of the estate.

the special case, as to any dividends being declared either of the joint estate of *Barrow* and *Geddes*, or of the separate estate of *Geddes*. And if the Order refers to the dividends declared under the commission against *Thomas Johnston*, the special case expressly states that *these, although declared, had not been received by Williams & Co.* But whether they had, or not, why are any dividends to be returned by them, before they make their election whether they will prove against the joint estate of *Barrow* and *Geddes*, or the separate estate of *Geddes*? If they had received dividends, under either of these two last-mentioned estates, then, of course, upon making their election to prove against one, they must return the dividends received on their proof against the other. But in whatever way they make their election as against *these* estates, they have surely a right to retain the dividends received under the commission against *Thomas Johnston*; for *his* estate formed a perfectly distinct fund from either that of *Barrow* and *Geddes*, or of *G. Geddes*. As there is no express determination by his Lordship of the second question proposed by the special case, and the only dividends mentioned are those declared, *not received*, under *Johnston's* commission, it is supposed that this part of the Order must necessarily refer to *those* dividends; and if so, it is really very difficult to discover upon what principle this part of his Lordship's judgment is founded. Conciseness proves sometimes as perplexing as diffuseness. The reader cannot fail to remark, in the report of this case, a striking contrast in those qualities, between the judgment and the argument. This, it must be acknowledged, is somewhat a reversal of the order of things, according to the former system of bankruptcy reporting, where the argument is given so briefly, and the judgment so much at length. In the present instance, however, the authors must plead not guilty to any wilful departure from the ancient practice.

1832.

Ex parte WILLIAM PEARSE and WILLIAM GEORGE.—
In the matter of WILLIAM VIZARD FOXWELL.

Southampton
Buildings,
July 25.

THIS was the petition of two judgment creditors, praying that they might be admitted to prove the amount of their judgment debt, for the purpose of voting in the choice of assignees, and assenting to or dissenting from the certificate; that the choice of assignees already made might be set aside, and a new choice directed; and that the costs of the application might be paid out of the estate. The petition stated the following facts in support of the application.

The fiat issued on the 4th June 1832, on the petition of *Henry Bishop* an attorney, who was then also attorney for the bankrupt. Previous to February 1832, the bankrupt, who was a tanner, converted into money the greater part of a valuable stock, and about the same time sold, or pretended to sell, and transferred to his brother, *John Burford Foxwell*, a certain leasehold estate, which had been previously offered for sale, and bought in at the sum of 600*l*. On the 8th February 1832, *H. Bishop*, then being also the bankrupt's attorney, issued a *fi. fa.* against him, under which the whole of his effects were sold for the benefit of *Bishop*, under a warrant of attorney, given him by the bankrupt, dated the 7th January 1833. *Bishop* having allowed more than two months to pass after the levy under the execution, issued the present fiat, with a view (as alleged by the petition) to get the bankrupt free from his liability to the petitioners on their judgment. *Bishop* proved a debt of 125*l*. 13*s*. 5*d*., and brought with him the depositions of five other creditors in proof of debts, which

A testator indebted on bond devises his real estate to the bankrupt and two other trustees, for payment of his debts. The bond creditor, after the testator's death, brings an action against the bankrupt and the other devisees, and recovers a joint judgment against them. Held, that he could not prove under the separate commission against the bankrupt, even for the purpose of voting in the choice of assignees.

1832.

Ex parte
PEARSE
and another.

were admitted by the Commissioners. It was alleged, that although all the creditors of the bankrupt resided in the county of Gloucester, yet the fiat had been issued to a London Commissioner, with a view to render more difficult the investigation of the bankrupt's affairs; and that all the proofs had been procured by *Bishop*, for the purpose of obtaining for the bankrupt his certificate.

It appeared, that *Thomas Foxwell*, the father of the bankrupt, was indebted at the time of his death to one of the petitioners, *William George*, in the sum of 2500*l.* on bond; and, being seised of considerable real property, by his will, dated the 12th January 1828, devised certain real estates to *Sarah Foxwell* for life, and after her decease to the bankrupt and two other trustees, upon trust for sale and the payment of his debts. By an indenture bearing date the 21st October 1831, the petitioner *William George*, in consideration of 400*l.*; assigned the above-mentioned bond debt to the other petitioner, *William Pearse*; who afterwards brought an action in the Exchequer, in the name of *W. George*, against the bankrupt, and the two other trustees, as such devisees as aforesaid, to recover the money due on the bond. The action was tried before Lord *Lyndhurst*, when the jury found specially, that *S. Foxwell*, and the bankrupt and his two co-trustees, after the death of the testator, had certain lands by devise, and that the defendants in such action had aliened such lands to the value of 6320*l.*; and a verdict was given for the plaintiff, for his debt and damages on the bond. Final judgment was thereupon signed on the 12th February last; and the petitioner, *W. Pearse*, sued out execution upon such judgment against the goods of

the bankrupt, but in consequence of his goods having been previously sold under the fiat, there were no effects of the bankrupt to satisfy the execution. The petitioners afterwards tendered a proof under the fiat for 3000*l.* remaining due on the bond and judgment, for the purpose of enabling them to vote in the choice of assignees, and to assent to or dissent from the certificate; but the proof being objected to by *Bishop*, the Commissioner rejected the proof, on the ground that it was a joint debt, and could not be proved for any purpose against the bankrupt. The petitioners alleged, that in consequence of the proof being rejected, *Bishop* was enabled to carry the choice of assignees, and had himself been appointed sole assignee. The petition then stated, that the bankrupt's last examination was appointed for the 17th July instant; and that one of the bankrupt's co-trustees lately died in the King's Bench prison insolvent, and that *S. Foxwell*, and the other co-trustee of the bankrupt, were also insolvent or embarrassed in their circumstances.

1832.

Ex parte
PEARSE
and another.

Mr. *Keene*, in support of the petition, cited the case of *Ex parte Elton*(a), where it was held that joint creditors might be admitted to prove under a separate commission,—though not to receive a dividend, until an account was taken of what they had received, or might receive, from the partnership effects. By the 6 *Geo.* 4. c. 16. s. 62., also, it is provided that in all commissions against one of several partners, any creditor, to whom the bankrupt is indebted jointly with the other partner, may prove his debt for the purpose of voting in the choice of assignees, and of assenting to, or dissenting

(a) 3 Ves. 238.

1892.

Ex parte
PEARSE
and another.

from the certificate, though not to receive a dividend, until the separate creditors are paid in full. [*Erskine*, C. J. Here the persons are not *partners*; but the judgment is, that the plaintiff recover his debt against them in their individual character of devisees. Besides, how can you get over the difficulty, that joint creditors cannot vote in the choice of assignees? Sir *A. Pell*. It appears to have been an action against the heir, as well as against the four devisees, under the 3 *W. & M. c.* 14. s. 3. The jury found in favour of the heir, that he took no lands by descent; but against the devisees, that they did take lands by devise, and that the plaintiff, as against them, do recover his debt. Sir *G. Rose*. This raises no provable debt, as against the bankrupt. You ought to proceed by *scire facias* on the judgment.] That will be of no avail, for one of the three other devisees died insolvent, and the two others are also in insolvent circumstances.

Mr. *Montagu*, *contra*. There is an objection to the hearing of this petition; for the bankrupt is a party materially interested in the result, and he has not been served with a copy of it. But, independently of this objection, the Commissioner was clearly right in rejecting this proof. Here is a judgment obtained against four, and the petitioners might have taken out execution against every one of the defendants. Now it is only stated by the petition, that the two other surviving co-defendants are "in insolvent or embarrassed circumstances." This is too general and indistinct an allegation. Insolvency must be proved by an adjudication of insolvency under the Insolvent Act; *Ex parte Janson* (a). The case of *Ex parte Morris* (b), also,

(a) Buck. 227.

(b) Mont. 218.

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 Ex parte
 PEARSE
 and another.

has expressly determined, that an insolvent, who has even applied to take the benefit of the Insolvent Act, is not to be considered as insolvent, within the rule that a proof cannot be made against the separate estate, if there is a solvent partner. The petitioners have, moreover, no right to prove, even for the purpose of voting in the choice of assignees. It is quite clear, that the 62d section of the Bankrupt Act is confined to commissions against partners. If they have any right, therefore, it must be before that statute; and all the cases show plainly, that the insolvency alone of one partner does not entitle a joint creditor to prove under a separate commission against the other.

Sir G. ROSE.—A man must be taken to be insolvent, who is not able to meet his engagements. Such was the law laid down by Sir *Samuel Romilly's* Act; but that act has expired. The debt here, however, is not one originally of the bankrupt. It was a debt of the testator; and the bankrupt is one of four devisees. Now the rule in bankruptcy is, that if you have the security of the estate, you cannot prove under the commission, until you have made the most of your security. Here the petitioners have a judgment against the estate.

Mr. KEENE in reply. The petitioners in this case have asserted a right of proof, merely for the purpose of voting in the choice of assignees, or of assenting to, or dissenting from, the certificate; and it was not necessary to serve the bankrupt with a petition for either of these purposes. The jury have found that the bankrupt has aliened the lands devised, which

1832.

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Ex parte
 PEARSE
 and another.

amounts, therefore, to a breach of trust. All the cases cited in support of the argument,—that proof cannot be made of a joint debt under a separate commission, where there is a solvent partner,—relate to a proof for the purpose of receiving dividends; not, as in this case, for the purpose merely of voting in the choice of assignees. Then, as to the observation that the right of proof of a joint debt under a separate commission is confined to debts contracted by partners, the case of *Ex parte Pinkerton* (a) shows that the right is not so limited; for there a joint creditor was permitted to prove, although there was no partnership, but merely a joint liability.

ERSKINE, C. J.—Some points in this case will require further consideration, before we pronounce our final judgment on it. There is no occasion, however, for me to express any opinion on that part of the prayer of the petition, which relates to the setting aside the choice of assignees; because the view I take of the case at present is, that this, if any debt at all, is a *joint* debt, and therefore not proveable for the purpose of voting in the choice of assignees. Then, as to the right of proving a joint debt against one of several parties jointly liable, because there is no joint estate, or any solvent party,—it appears to me, that there is nothing in this petition which raises that point. There may be a question, however, whether the bankrupt should not have been served with the petition, as he is the principal party interested.

Sir A. PELL.—I should wish to refer to the authorities on this subject, before I give my judgment; but it

(a) 6 Vesey, 814, (note.)

appears to me that this is quite a new case. I find, however, in the books three cases, where a new choice of assignees has been directed, because the proofs of creditors have been improperly rejected. Now, here it may be said, that the great body of the creditors has been rejected; as the amount of the debt sought to be proved is so considerable. But whether the judgment obtained by the petitioners gives them a right to prove, for the purpose of voting in the choice of assignees, I am not at present prepared to say.

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Ex parte
PEARSE
and another.

Sir J. CROSS.—I am also unprepared at present to offer an opinion on the prayer of this petition, and shall therefore think it right to refer to the statute of 3 W. & M. c. 14., relating to the relief of creditors against fraudulent devises. If the claim of the petitioners on this judgment be a debt, it is one of a very peculiar nature. I have endeavoured to ascertain, if there was any case, where a debt of this kind was ever proved before under a commission of bankruptcy, and I cannot find there is. The petitioners state that they had a bond and judgment against the bankrupt for 3000*l.*, and that the bankrupt's solicitor proved a debt for 150*l.*, and got powers of attorney to prove other debts, which carried the choice of assignees, for the purpose of defeating the execution of these petitioners. The case requires much consideration, both as to the facts and the law.

Cur. adv. vult.

ERSKINE, C. J. this day intimated to the bar, that he and the other Judges had considered this case, and were of opinion that the petition must be dismissed with costs (a).

November 28.

(a) And see *Ex parte Christy*, ante, 155.

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Southampton
Buildings,
November 28.

If the bankrupt
refuses to join in
the conveyance
of any part of
his estate, the
Court will make
an order for him
to do so, under
the 6 Geo. 4.
c. 16. s. 78.

Ex parte JACKSON.

THIS was the petition of a purchaser of an estate of the bankrupt, which had been sold to him by the assignees, praying for an order, under the 78th section of the 6 Geo. 4. c. 16., that the bankrupt might be directed to join in the conveyance of the estate within a given time; the bankrupt having refused to execute such conveyance, when it was tendered to him for that purpose in October last.

Mr. *Wray*, in support of the petition, referred to the clause in the Bankrupt Act, on which the petition was founded; and said, it was necessary, for the complete security of the purchaser in this case, that the Court should make the order prayed for; because the act provides, that if the bankrupt shall not execute the conveyance within the time directed by the order, both the bankrupt, and all persons claiming under him, shall be stopped from objecting to the validity of the conveyance; so that, notwithstanding the refusal of the bankrupt, the purchaser will have the same benefit, after obtaining this order, as if the bankrupt had executed the conveyance.

Mr. *Stinton*, who appeared for the bankrupt, said, that the reason why he declined to execute the conveyance was, because his brother had a mortgage on the estate, which he thought ought to be redeemed previous to the sale of the property by the assignees. Under these circumstances, he hoped the order would be postponed, until a meeting of creditors could be called, to consider the propriety of the redemption of the mortgage.

Sir G. ROSE.—We can postpone the order for a reasonable time, if you tell us that you dispute the commission; but you can only take a qualified order, at the hazard of costs.

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—
Ex parte
JACKSON.

Order made as prayed; the bankrupt to have his costs out of the estate.

Ex parte GRANGER.—In the matter of CHAMBERS and another.

Southampton
Buildings,
November 28.

THIS was the petition of a creditor to supersede a commission, on the ground of fraud. The commission had issued so long ago as October 1812.

After a lapse of 20 years, and the death of the petitioning creditor and the bankrupt, the Court will not entertain a petition for a supersedeas, on the ground of fraud.

Mr. *Swanston*, in support of the petition, contended, that although the petition was preferred so long after the issuing of the commission, yet on the ground of fraud, which no time can sanctify, the Court would hear it, notwithstanding the application came so late. The commission in this case was destitute of all legal validity, and was issued for a fraudulent purpose.

The COURT thought they could not hear a petition to supersede, after so great a lapse of time, unless a very good reason could be shown why the petitioner had not come earlier.

Mr. *Swanston* then proceeded to read the affidavits, in order to account for the delay; but these were far from satisfactory.

ERSKINE, C. J.—I was anxious to hear every thing

1832.

Ex parte
GRANGER.

that could be stated to explain the cause of the delay, but I am confirmed in the opinion that we cannot entertain this petition. All the circumstances show, that there is not the slightest ground for the application. The petitioning creditor is dead—the bankrupts are dead—and the only ground that could possibly be urged for our making any order on such a petition, is, that the petitioner did not hear of the fraud until a long period after it took place, and that he then came as soon as he heard of it. But nothing like this is stated in the affidavits, and therefore the petition must be dismissed.

Sir J. CROSS concurred.

Sir G. ROSE.—We must look in a case like this to the effect of the *supersedeas*, undoing every thing that has been done, during no less a period than 20 years; and the application being made in the absence of the parties charged with the fraud, and who cannot now be brought before the Court. But, independently of this objection, there are many ways by which the fraud in this case, if real, could be exposed, without going the length of superseding the commission.

Mr. *Twiss*, who appeared to oppose the petition, then applied to the Court to order the costs of the petition to be paid by the solicitor who had presented it.

Sir G. ROSE.—We cannot do that without calling upon the solicitor to show cause on affidavit why he should not pay the costs.

Petition dismissed, generally, with costs

Ex parte CHRISTIE.—In the matter of CHRISTIE.

1832.

Southampton
Buildings,
November 28.

THIS was the first of two issues directed by the Lord Chancellor, in the same bankruptcy; the issue in the present case being to try whether, at the time of issuing the commission, the bankrupt was indebted to the petitioning creditor in the sum of 100*l.* and upwards. In this issue the petitioning creditor was the plaintiff, and the bankrupt the defendant; and the trial took place before Mr. Justice *James Parke*, at the last Yorkshire assizes, when it appeared that part of the debt consisted of a bill of exchange for 66*l.*, of which the bankrupt was the drawer; and that the plaintiff failed to prove the presentment of the bill for payment, or that notice was given to the bankrupt, as the drawer, of its dishonour, or any waiver of such notice by the defendant; and the learned Judge, under these circumstances, thought that there was not a sufficient proof of a good petitioning creditor's debt, and directed the jury to find a verdict for the defendant.

Where, upon the trial of an issue, to try whether there was a good petitioning creditor's debt, the bankrupt took an objection to the constitution of the debt, which he never alleged in his petition to supersede the commission, and the jury found a verdict against the petitioning creditor, the Court granted a new trial, on the ground of surprise.

Mr. *Jacob* and Mr. *Cresswell* now moved for a new trial, on the ground of surprise. In the petition, which the bankrupt presented to the Lord Chancellor to supersede the commission, the only grounds which were alleged by him were, 1st, that it was issued to dissolve a partnership; and 2dly, that there was no petitioning creditor's debt. The alleged debt, as stated by the bankrupt, was 104*l.*; and he urged that part of this sum, amounting to 17*l.*, was composed of interest on a bill of exchange, which the bankrupt contended could not be added to the principal sum, so as to form part of the petitioning creditor's debt, as the bill of exchange

1832.

**Ex parte
CHRISTIE.**

did not carry interest on the face of it. We stated on that occasion, that the 104*l.* did not comprise the whole items of our debt, but that we could show a debt of 160*l.* and upwards; and that even after deducting the 17*l.* for interest, there would be about 150*l.* for the petitioning creditor's debt. The material question raised by us, on the hearing of the petition before the Lord Chancellor, was, whether certain advances made by the petitioning creditor were for the use of the partnership, or the separate use of the bankrupt. It was never intended by the Lord Chancellor, in granting an issue, to raise any question as to the validity of the bill for 66*l.*, which was not in the slightest degree disputed on the former hearing.

Mr. *Swanston*, Mr. *Montagu*, and Mr. *Hoggins*, contra. The issue directed by the Lord Chancellor was, as to the existence of any petitioning creditor's debt. The whole constitution of the debt was therefore put in issue, and all the items composing it ought to have been proved. If there had been any admission of the petitioning creditor's debt, on the hearing of the petition before the Lord Chancellor, it was incumbent on the other side to have produced such admission on the trial. But the contrary is the fact; for we then disputed the legal structure of the debt, and contended that any computation of interest on a bill, which did not profess to carry interest on the face of it, could not form any part of the petitioning creditor's debt. There is no evidence of any miscarriage of the petitioning creditor at the trial, except that he merely failed in proving his case. The account made out by him plainly shows, that the bill for 66*l.* formed no part of his debt to

support the commission. (By this account, which was now relied on by the plaintiff, but which was not produced in evidence at the trial, it appeared that the bill for 66*l.* was on both the debit and credit sides of the account. The fact was, that this bill had been given by the bankrupt in satisfaction of another bill for 63*l.*; but the bill for 66*l.* not being paid, it was entered again on the credit side of the account; and the 63*l.* bill was in reality never satisfied.) This application for a new trial being made on the ground of surprise, there ought to be an affidavit as to that fact; but there is none to show that they were in any way taken by surprise. But whether they were taken by surprise, or not, as they have failed in proving a good petitioning creditor's debt, the Court cannot hesitate to supersede this commission. For in *Ex parte Dick* (a), where a bankrupt had in an action against his assignees established that there was no act of bankruptcy, Lord *Eldon* held, that he ought not, unless under very special circumstances, to delay superseding the commission until after another trial; and that it was not a sufficient ground for a new trial, that the assignees had evidence to support the commission, which they were prevented from producing by surprise. If they talk of surprise on the other side, we can now prove, that notice was given to them, before the trial, to prove the consideration for the bill for 63*l.*, as well as for the bill for 66*l.* We say, that no consideration whatever was given for the 63*l.* bill, and that they were unable to prove any consideration at the trial.

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Ex parte
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ERSKINE, C. J.—I confess, I am not satisfied in my own mind, that the object sought by this trial has been

(a) 1 Rose, 51.

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effectually attained. If the bill for 66*l.* was dishonoured, and no notice given to the bankrupt as drawer, then the holder of it would undoubtedly have made the bill his own. But the bankrupt never urged this objection on the hearing of the petition before the Lord Chancellor, but merely disputed the sum charged for interest. It seems to me, that some further investigation should take place, as to the existence of a debt; for, upon the result of this trial, it is impossible to say decidedly, that there was no petitioning creditor's debt.

Sir J. CROSS.—I am also unable to say, that I am satisfied with this verdict. By referring to the account which has been handed in to the Court, it appears that the bill for 66*l.* was neutralized, by being entered on both sides of the account. Now, from what occurred at the trial, it would seem that the evidence treated the bill for 66*l.* as the debt, instead of proving the consideration for the bill.

Sir G. ROSE.—I entirely concur in the dissatisfaction expressed at the result of this trial; and think it was a surprise on the petitioning creditor, for the bankrupt to object to the want of proof of notice of dishonour of the bill, when he shaped his case so differently on the hearing before the Lord Chancellor. If on that occasion the bankrupt had contended that there was no debt, on the ground that there was no notice of the bill being dishonoured, the Lord Chancellor would no doubt have directed an inquiry as to that fact. I therefore think, that there ought to be a new trial.

1832.

SECOND CASE.

Southampton
Buildings,
November 29.

Ex parte CHRISTIE.—In the matter of CHRISTIE.

THE petition in this case related to another issue directed by the Lord Chancellor in the same bankruptcy, in which the bankrupt was made plaintiff, and the petitioning creditor defendant. The issue in this case was,—“Whether the commission was issued for the purpose of compelling the petitioner to agree to a dissolution of the partnership subsisting between him and *Saunders*, with liberty for the judge to indorse on the postea any special circumstances, as he might think fit.”

A commission issued by one partner against another, not for the purpose of distributing the bankrupt's effects among his creditors, but for the sole purpose of dissolving the partnership, is super-sedable.

The following were the facts as stated in the petition. The bankrupt had, up to the period of his bankruptcy, carried on business as an engineer and steam-engine manufacturer at Blackburn, in Lancashire, and had dealings with *Saunders*, an auctioneer, who lived at Sheffield. In August 1825, the bankrupt sold to *Saunders* a model of a machine invented by him for forging files, and in October following, a steam-engine, the prices of which amounted to 196*l.* 9*s.* 6*d.* *Saunders* then proposed that a partnership, as engineers and steam-engine manufacturers, should be formed between him and the bankrupt, and one *Hoole*, *Saunders*'s father-in-law; which proposal the bankrupt acceded to, and a partnership was formed between them accordingly, commencing from the 1st December 1825, and which continued, with apparent satisfaction to all parties, till the beginning of 1831, when *Saunders* and *Hoole* became anxious to dissolve it, and resorted to various expedients for that purpose. *Saunders* wrote letters to

1832.

Ex parte
CHRISTIE.

the debtors of the partnership, desiring them not to pay their debts to the bankrupt; and he also arrested the bankrupt for an alleged debt of 104*l.*, without having given him credit for the sum of 76*l.* 13*s.* 6*d.*, which the bankrupt stated was the balance due to him in respect of the goods sold to *Saunders* in 1825. The bankrupt not being able to procure bail until after the expiration of 21 days, a commission issued against him on the 30th April 1831, upon the petition of *Saunders*, who, with one *Skidmore*, was elected assignee; the act of bankruptcy, on which the adjudication was founded, being the lying in prison. The bankrupt then petitioned the Lord Chancellor to supersede the commission, stating that it was issued by *Saunders* “solely for the purpose of obtaining a dissolution of partnership, and in order to defraud the bankrupt of his share of the profits.”

The petition came on for hearing before the Lord Chancellor on the 10th January 1832, when it was ordered that the parties should forthwith proceed to a trial at law, upon two issues, one of which was the issue before stated; the other was the subject of the preceding case, namely, “whether, at the date and issuing of the commission against the petitioner, the petitioner was indebted to *Saunders*, the petitioning creditor, in the sum of 100*l.*” Both these issues were tried at the Lent assizes for Yorkshire 1832, before Mr. Justice *James Parke*, when the jury found for the bankrupt on the last-mentioned issue, namely, that he was not indebted to the petitioning creditor in the sum of 100*l.* And with respect to the issue, which is the subject of the present case, the jury, under the direction of the learned judge, found, in form, for the peti-

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Ex parte
CHRISTIE.

tioning creditor, *viz.* “that the commission was not issued for the purpose of compelling the bankrupt to agree to a dissolution of partnership;” though in substance the verdict was for the bankrupt; for the judge indorsed upon the *postea* as follows; “I do hereby certify, that upon the said verdict being found, I further directed the jury to say, whether the purpose of suing out the commission was to cause all the estate and effects of the said plaintiff to be distributed amongst his creditors in payment of their debts, or merely to put an end to the partnership subsisting between the plaintiff and *Hoole* and *Saunders*. And I further certify, that the said jury did thereupon say, that the purpose of suing out the said commission of bankrupt was, not to cause all the estate and effects of the said plaintiff to be distributed amongst his creditors in payment of their debts, but merely to put an end to the partnership between the said plaintiff and *Hoole* and *Saunders*. And I further certify, that I thereupon directed the jury also to say, whether the purpose of suing out the said commission was simply to put an end to the partnership, or also to take an undue advantage over the said plaintiff in settling the partnership affairs, and to obtain the partnership business for himself, the defendant, or for himself and *Hoole*. And the said jury did thereupon say, that the purpose of suing out the said commission was simply to put an end to the said partnership, and not also to take an undue advantage over the said plaintiff in settling the partnership affairs; nor to obtain the partnership business for himself, the defendant, or for himself and *Hoole*.”

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The opinion which the Court expressed in the preceding case, on the petition of *Saunders* for a new trial of the issue, as to the petitioning creditor's debt, was, that the verdict upon that issue was not satisfactory; and that it would direct a new trial of that issue, or some other inquiry, for the purpose of determining the validity of the petitioning creditor's debt, unless the Court should, upon the hearing of this petition, be of opinion that the commission ought to be superseded, upon the grounds appearing on the special indorsement on the postea upon the trial of this issue.

The prayer of this petition was for further directions, and that the commission might be superseded; and the petition now came on for hearing, together with the original petition, which had been transferred from the paper of the Lord Chancellor.

Mr. *Swunston* and Mr. *Montagu* appeared in support of the petition. The question is, whether this commission can be suffered to stand; or whether, being issued not for the distribution of the effects, but for an illegitimate purpose, *viz.* to dissolve the partnership, it ought not to be superseded. It is, in fact, a proceeding in fraud of all the legitimate objects of a commission. The act of bankruptcy, in this case, was lying in prison 21 days on an arrest at the suit of the petitioning creditor. It was the petitioning creditor, therefore, who compelled the bankrupt to commit the act of bankruptcy. There were only two debts proved under the commission, namely, that of the petitioning creditor, and that of the solicitor. We contend, that the bankrupt is entitled, after the finding of the jury as indorsed upon the postea, to have the commission

superseded immediately; it having been issued for a purpose which the Court has always refused to recognize. The terms of the issue in the present case are somewhat singular, *viz.* “whether the commission was issued, for the purpose of *compelling the petitioner to agree* to a dissolution of the partnership subsisting between him and *Saunders*.” But the jury having expressly found that the purpose of suing out the commission was to put an end to the partnership, there can be no question that, according to the principle which governs all the cases on the subject, this commission must be superseded. In *Ex parte Brown* (a), it was decided by Lord *Eldon*, that if a commission be taken out for a purpose foreign from its proper object,—as to work a dissolution of partnership,—it is supersedable at the costs of those who take it out; and this, notwithstanding there be even a good trading, a good petitioning creditor’s debt, and a good act of bankruptcy. So, in *Ex parte Harcourt* (b), it was ruled by the same learned judge, that although all the requisites for sustaining a commission were complied with, and the commission was in itself legally valid,—yet where it had been taken out against good faith, and with a view to enforce a compliance with an arrangement then pending between the parties, the Court would supersede it, upon the general principle which all courts apply in controlling the abuse of their process. And the like decision was come to in *Ex parte Gallimore* (c), where a commission was taken out by a landlord against his tenant to determine a lease, contrary to good faith. In *Ex parte Bourne* (d), it is true Sir *J. Leach* held, that though a

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Ex parte
CHRISTIE.

(a) 1 Rose, 151.

(b) 3 Rose, 203.

(c) 2 Rose, 424.

(d) 1 G. & J. 311.

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commission was taken out for an undue purpose, yet if that purpose could be defeated, without superseding the commission, the Court would not interfere. But when the same case came before Lord *Eldon*, on appeal, his lordship held, that if a commission was taken out for purposes which have no earthly connection with the legitimate purposes of a commission, the Court would say it was not a commission, and would not deal with it by making any qualified order, but would declare at once that it should not stand. And the commission in that case having been taken out for the purpose of putting an end to an action by the bankrupt against the petitioning creditor, and not for the purpose of its operating as a commission for the benefit of the creditors, his lordship ordered it to be superseded,—notwithstanding it appeared, that an intention of working it for the legitimate purpose of a commission, was afterwards adopted; and Sir *J. Leach*'s order was accordingly reversed. After all these authorities, and the result of the trial of the issue directed by the Lord Chancellor, the Court can have no option but to supersede this commission.

Mr. *Jacob*, and Mr. *Cresswell*, contra. Notwithstanding the cases that have been cited to induce the Court to grant a supersedeas, it will be found, if they are accurately examined, that there is really only one *dictum* that can be urged in favour of the argument on the other side. The principle, on which those cases were decided, tends more to establish this commission, than to form any groundwork for a supersedeas. And indeed, if the Court were to hold, that a commission issued simply to dissolve a partnership, without any

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fraud on the part of the petitioning creditor, or any object to obtain an undue preference over the other creditors, is void; it would, in innumerable instances, create the most serious difficulties among traders who are partners, and be productive of great confusion in the commercial world. The jury in this case have expressly found, that there was no design to *compel* a dissolution of partnership, by threatening to issue a commission. That being so, and there being not the slightest imputation of any fraudulent object in issuing it, the Court will not deprive the party here of his common law right, which he possesses in common with every subject of the realm, to issue a commission of bankrupt against his debtor, where he can duly establish the three ingredients which the law requires to support it. The doctrine, that where a man has a legal right to issue a commission against his debtor, the commission cannot be supported, if he was actuated by any other motive than to distribute the property amongst the creditors, has only grown up within the last 30 or 40 years. But it is rightly said by Sir *J. Leach* in *Ex parte Bourne* (a), that Courts of Justice have nothing to do with the motives of parties, who assert in a legal manner their legal rights, whether the motives be just or unjust. And in *Ex parte Staff* (b), the same learned judge struggled to get rid of the motive, where the motive was to benefit the bankrupt, and not the creditors. But, for some reasons of alleged equity, when the same case came before Lord *Eldon*, on appeal, it was decided that such a commission was void, because the motive of the petitioning creditor was to benefit the bankrupt. A doctrine like this was, in fact, a perfect

(a) 1 G. & J. 316.

(b) Buck, 249.

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nuisance; and the late act has very properly put a stop to all questions of motive, so far as regards concerted commissions. [*Erskine* C. J. Does the act do any thing more than this, namely, declare that the commission shall not be superseded on the ground of concert alone, where the object is a fair distribution of the effects, notwithstanding the bankrupt is a party to the issuing of the commission?] The question in these cases always was, whether it was the bankrupt's commission, or whether the commission was issued at the instance of the bankrupt. But we admit, that the late act does not apply in terms to the present case (a). The other side, however, are contending for the most enormous extension of this doctrine. They say, that though one partner is notoriously insolvent, and the other is a *bonâ fide* creditor, and without any fraud takes out a commission against him, wishing to dissolve the partnership, that the commission shall be void. In this case, it must be remembered, there were no threats used by the petitioning creditor, to force his partner, or, in the words of the issue directed by the Lord Chancellor, "to compel him to agree to a dissolution of the partnership," as was asserted in the petition. And we contend, moreover, that there is nothing to be found in any book, which says that a man cannot legally and equitably issue a commission to get rid of an insolvent partner. The consequences would be monstrous, if such was held to be the law. What a

(a) The act referred to is the Bankruptcy Court Act of the 1 & 2 Will. 4, c. 56, which by section 42 declares, that "no commission of bankrupt shall be superseded, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication has been concerted by and between the petitioning creditor, his solicitor or agent, or any of them, and the bankrupt, his solicitor or agent, or any of them." And see also 6 Geo. 4, c. 16, ss. 6, 7.

situation would the solvent partner be in! No goods could be bought, or paid for, or any bills accepted by him, without involving him in a liability to the assignees of the insolvent partner, when a commission was issued against him by any creditor. This would be the extremity of injustice towards a solvent trader, seeking to relieve himself from his insolvent partner. Suppose a young partner, after a long course of extravagance, is arrested for debt by some third person, and he lies in prison; are not his partners to issue a commission against him? Or are they to go on, honouring his drafts, and accounting to him for a division of the profits, because they must not issue a commission for the purpose of dissolving the partnership,—so that when a commission is at last issued by any other person, the solvent partners must then pay his assignees over again what they had previously been compelled to pay the bankrupt?

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What are the facts of this case? Mr. *Christie* says in his petition, that the partnership was carried on with apparent satisfaction to both the other partners. The others, however, did not agree with him in that. He had, it is true, the ingenuity of inventing machines, which like many other ingenious inventions had this merit, that when set up they would not work. He finally becomes involved in debt, and gets into prison. But independently of his insolvency, he was also a fraudulent partner; for he was in the practice of misapplying the partnership funds. Is the solvent partner then compelled to continue, under the awful liabilities of a partner, with such a colleague, even after the latter has committed an act of bankruptcy? *Saunders* swears, that the only effectual remedy to recover his

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debt, was to issue a commission against *Christie*. And this, it is apprehended, *was* in fact the best mode of recovering his debt. But suppose there are no effects of the bankrupt partner, except just sufficient to pay the expenses of working the commission. Is the solvent partner to be told, that he cannot issue a commission, merely because he is desirous of getting rid of his insolvent partner, and he happens to be indifferent as to the recovery of his debt? To maintain such a principle as this, would be an enormous abuse of the bankrupt laws.

But let us examine the cases connected with this subject, and the authorities that have been cited in support of this doctrine by the other side.

Nothing can be more clear, than that any person who is a creditor to the amount of 100*l.* and upwards, may strike a docket and take out a commission against any trader, on giving a bond to the Lord Chancellor to prosecute it, and entering into the usual formalities at the bankrupt office; *Ex parte Lanchester* (a), *Ex parte Downes* (b), *Ex parte Harcourt* (c). It has been taken for granted, in the argument on the other side, that the Lord Chancellor would always supersede a commission, if the object of the petitioning creditor was to produce some other effect, than a mere distribution of the bankrupt's property amongst his creditors. But that principle is much too broadly laid down, and cannot be deduced to such an extent from any of the cases in the books. In *Ex parte Gouthwaite* (d), Lord *Eldon* says, "without doubt, a commission can be taken

(a) 1 Rose, 220; 17 Ves. 512.

(c) 2 Rose, 203.

(b) 1 Rose, 398.

(d) 1 Rose, 87.

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out to defeat an execution (a); but then it must not be the commission of the bankrupt." [*Erskine*, C. J. There the effect of the commission was to defeat the execution, and to cause an equal distribution among the creditors.] So here, the effect of the commission would be to put the bankrupt's effects into an equal course of distribution, before the partnership would be dissolved; for there would be no actual dissolution until adjudication and assignment. The case of *Ex parte Gallimore* (b), which has been cited by the other side, proceeded on a supposed case of fraud in a landlord issuing a commission, for the mere purpose of determining a beneficial lease granted by him to his tenant. The fraud was denied by him, but not his wish to determine the lease, and Lord *Eldon* says in the conclusion of his judgment, "whether, the object of Mr. *Wedgwood* being to get possession of the colliery, he will get possession of it by means of this commission, is a question I have nothing to do with." In *Ex parte Wilbeam* (c), which was before Sir *J. Leach*, his honour says, that "a commission is not to be superseded, where there is no fraud, merely because the petitioning creditor has a bye-motive beyond the distribution of the estate. [Sir *J. Cross*. Here the motive, as found by the jury, is *in place* of the distribution of the estate.] But still the jury have found no fraud in the issuing of the commission. Now, although there are many cases where a commission has been superseded, because it has been fraudulently issued; there is not one, where a superseas has been directed, merely because the petitioning creditor has sought to place himself in that situation,

(a) And see *Ex parte Gardner*, 1 Rose, 378.

(b) 2 Rose, 424.

(c) Buck, 459; S. C. *Ex parte Wilbran*, 5 Madd. 1.

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which would naturally and legitimately follow as the effect of the commission. So, in many instances, a commission has been superseded, because it was the commission of the bankrupt himself, and he would therefore defraud his creditors by obtaining a discharge under a commission over which he had himself the control; *Ex parte Gardner* (a), *Ex parte Downes* (b), *Ex parte Gouthwaite* (c), *Ex parte Binner* (d). In *Ex parte Harcourt* (e), which has been cited in support of the argument on the other side, the commission was, in the words of Lord *Eldon* (f), “resorted to in contravention of good faith, pending a negotiation, whereby the parties were thrown off their guard, and for the illegitimate purpose of inducing an accession to the demands of the party issuing it;” and it was for this reason superseded. In another part of his judgment, Lord *Eldon* says (g), “Regarding the commission as a species of execution, this Court would relieve against an abuse of it, upon the same principle that all Courts of Justice regulate their process.” Now, how would a Court of Law regulate its process in a case of this description? Suppose a man, who was a *bonâ fide* creditor of another, was to arrest his debtor, not for the real purpose of enforcing payment of the debt, but to put him in prison for the purpose of his committing an act of bankruptcy, by lying in prison. Would the Court, in such a case, let the defendant out on common bail? [*Erskine*, C. J. If the object of an arrest was to compel the defendant to stay a pending action, would not the Court in that case discharge the defendant from the arrest?] The Court would not, it is appre-

(a) 1 Rose, 377; 1 V. & B. 45.

(b) 1 Rose, 398.

(c) Id. 87.

(d) 1 Madd. 250.

(e) 2 Rose, 203.

(f) Id. 215.

(g) Id. 212.

hended, interfere in such a case. If, indeed, the creditor had fraudulently prevented the defendant from putting in bail;—or if it could be shown that there was any fraud practised in the mode of making the arrest,—or that the party had been fraudulently arrested for money not due,—(although in general the Courts will not try this last question on affidavit)—in all these cases, a Court of Law would no doubt interfere. But if a party, against whom a verdict has been obtained by a plaintiff in an action, confess a judgment to a *bonâ fide* creditor, in order to pay him and defeat the plaintiff, the Court could not in such case interpose in favour of the plaintiff. Though, if the judgment had been confessed to the party for the purpose of securing the property to the debtor, and to protect him from the effects of the verdict, the Court would of course in such a case interfere, on the ground of fraud. [Sir G. Rose. The grounds, on which Courts of Law interfere in setting process aside, are precisely the same as those on which this Court proceeds in superseding a commission, namely, because its process has been abused.] Courts of Law, however, seldom inquire into the motives of a plaintiff, or a prosecutor. In arrests, issuing commissions, and criminal prosecutions, it is no ground of action that the proceeding has been malicious, unless it has been issued without probable cause; that is, the party is not responsible, if he merely puts the law in force to produce the legal result. Where a commission has been issued, to compel any party to consent to terms previously rejected, and which were to confer some unfair and fraudulent advantage, it is admitted, that the Lord Chancellor has interfered by superseding the commission,—as in the case of *Ex parte*

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Brown (a), the first which was cited in the argument by the other side. But that was a clear case of fraud in the bankrupt, who wishing to get rid of his partner, and the latter rejecting the terms proposed for a dissolution of their partnership, the bankrupt committed an act of bankruptcy, in order that a friend might sue out a commission, and thus enable him to cheat and defraud his partner. So that in this case there were two valid objections to the commission: 1st, that it was the commission of the bankrupt; and 2dly, that it was a fraud on the other partner. Upon the same principle, the case of *Ex parte Bourne (b)* was decided. The facts of that case were, that while *Bourne* was absent from home, one *Bennett* sold all his property below its value, pocketed the money to discharge an alleged debt due from *Bourne* to him, and in order to compel *Bourne* to ratify the sale, and protect *Bennett* from the consequences, as well as to prevent any inquiry into the account between himself and *Bourne*, *Bennett* issued a commission. The whole transaction was clearly fraudulent, and the commission was superseded accordingly. So in *Ex parte Bowes (c)*, which was the first of this class of cases, and which was much relied on by Lord *Eldon* in his judgment in *Ex parte Bourne (d)*, a commission was superseded, where it appeared to have been issued to obtain an unfair advantage, in settling a long account between the petitioning creditor and the bankrupt.

The petitioner himself in this case shews, by the language of his petition, what in the judgment of his

(a) 1 Rose, 151.

(b) 1 G. & J. 311, 2 G. & J. 137.

(c) 4 Ves. 168.

(d) 2 G. & J. 142.

advisers was necessary to be established, to induce the Court to supersede this commission. For he alleges, that it was issued by the petitioning creditors, "to obtain a dissolution on the terms proposed by them, to the prejudice of the petitioner, and in order to *defraud* him of his share of the profits." Now the issue was directed, evidently, on the assumption that it was necessary to make out the allegation of the petitioner, viz. that the commission was issued for the purpose of compelling the bankrupt to agree to a dissolution of partnership; and that was expressly negatived by the jury.

In this case, there was no intention to take from the bankrupt his share of the profits of the partnership, or any thing which was not legitimately liable to the payment of debts. It has been urged on the other side, that the object of the commission was not to distribute the property among the creditors, but to dissolve the partnership. It must be remembered, however, that bankruptcy only works a dissolution, because it distributes the property. And the jury, therefore, by their finding, could at most only mean, that the dissolution was the primary object to be effected, by means of the working of the commission. But the bankruptcy of one partner is only a dissolution, if followed up by a commission and assignment; and the reason is, because it deprives him of all control over the partnership funds, and vests his share in the assignees, to be distributed according to law; *Hague v. Rolleston* (a). This doctrine is also recognized in *Thomason v. Frere* (b). So in *Ex parte Smith* (c), Lord Loughborough says, that "the issuing of the commission does nothing, unless the party is found a bankrupt. The adjudication that

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(a) 4 Burr. 2174.

(b) 10 East, 425.

(c) 5 Ves. 297.

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he is a bankrupt, is, what severs the partnership." The case of *Ramsbottom v. Lewis* (a), also, shows the situation in which a solvent partner is placed after the bankruptcy of his copartner; for he cannot then indorse bills in the name of the firm, so as to make a legal transfer of them to the indorsee.

We contend, therefore, that as the dissolution of the partnership was the natural and legal result of the commission issued in this case,—as there was no fraud in the issuing of it,—and as it had all the legal requisites to support it, the Court will not supersede it, merely because the jury have found that the purpose of suing it out was, to accomplish what the law says is the result of a commission,—namely, to put an end to the partnership subsisting between the plaintiff and *Hoole and Saunders*. With respect to any equity arising out of the facts of the case, we would only ask, which of these parties has the most equity? The man who wishes to get rid of an insolvent partner, who is himself a *bonâ fide* creditor, and who issues a legal commission for that purpose,—or the one, who, being insolvent, obstinately rejects all reasonable proposals to dissolve the partnership, and is determined to incumber the solvent partner. Encouragement ought surely to be given to any one to take out a commission against an insolvent trader, who has notoriously committed an act of bankruptcy, and who may go on trading to deceive innocent persons, and ruin his copartner by his misapplication of the partnership funds.

Mr. *Swanston*, in reply, was stopped by the Court.

ERSKINE, C. J.—This case appears to me to involve more a point of fact, than one of law; the material question being, for what purpose the commission was

(a) 1 Campb. 279.

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really issued; whether it was merely to put an end to the partnership subsisting between the petitioning creditor and the bankrupt, or for the purpose of dividing the property among the bankrupt's creditors. And the jury having expressly found, that this latter purpose never entered into the contemplation of the petitioning creditor, but that his object was merely to dissolve the partnership, I think this case falls clearly within the rule laid down in *Ex parte Bourne* (a). The concluding sentence of Lord *Eldon* in his judgment in that case appears to me to govern this. He says, "the question is not what they meant to do with the commission at a period subsequent to the issuing of it, and to the adjudication of the bankruptcy, but what was their purpose and intention at the time they actually issued it. The adoption of a right purpose afterwards, will not destroy the effect of the bad purpose in which it originated." And in the former part of his judgment he says, "I have invariably understood, that though the cases uniformly speak of a commission of bankruptcy as a matter of right to the subject, yet it was never maintained, within my recollection, that there could not be an abuse of the bankrupt law, and that a commission was to be considered a matter of right, when taken out for no earthly purpose connected with the legitimate objects of a commission." And again, "I think myself justified in saying, that if the object of this commission was to stay the action, and not to work the commission as a commission for the benefit of the creditors, this Court will not permit it to stand." I confess, I have heard nothing advanced in the argu-

(a) 2 G. & J. 137.

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ments of the present case, which shakes the positions there laid down by Lord *Eldon*. It is admitted, that the legitimate object of every commission is to distribute the effects of the bankrupt; and the assignment operating back to the act of bankruptcy, has the effect of dissolving the partnership, by severing the joint property. There may be indeed a mixed motive of working the commission for the benefit of the creditors, and also of dissolving the partnership. But has the petitioning creditor here that double purpose? All the facts clearly show, independently of the finding of the jury, that his main and exclusive object, in the first instance, was to get rid of the bankrupt as a partner. The petitioning creditor, the copartner, in this case arrests the bankrupt, and puts him in prison; where, being a person of no property, he must necessarily remain. The petitioning creditor was fully aware of this result; and thus becomes the very party causing and producing the act of bankruptcy, on which he issues the commission. He is charged with having arrested his partner to compel him to agree to a dissolution of the partnership, and because he refused to dissolve it, with having afterwards sued out the commission. This the petitioning creditor does not deny. So that, without looking to the finding of the jury, there can be no doubt that the petitioning creditor had not the distribution of the bankrupt's effects in view, but merely to effect a dissolution of the partnership. And when we have, moreover, a distinct finding of the jury,—that the purpose of suing out the commission was *not* to cause all the estate and effects of the bankrupt to be distributed amongst his creditors in payment of their

debts, but *merely* to put an end to the partnership,—that brings the case completely within the doctrine laid down by Lord *Eldon* in *Ex parte Bourne*. As the legislature, therefore, intended a commission of bankrupt for the distribution of the bankrupt's effects among his creditors, and not to serve the private purpose of any one creditor wholly distinct from that object, I am of opinion that this commission must be superseded.

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Sir J. CROSS.—In this case it is distinctly proved, that the commission was taken out for the express purpose of putting an end to the partnership. And yet it is contended, that notwithstanding this was the sole object of the petitioning creditor, we ought not to supersede the commission. Many hypothetical cases have been put, arguing *ab inconvenienti*, and urging the hardships upon partners who want to get rid of an insolvent partner. But what are the facts here? In the articles of partnership entered into between these parties, I observe there is a clause to this effect,—namely, that if any one of the partners should contract a debt for 50*l.*, without the consent of the other partners, the partnership should become void. If the bankrupt, therefore, in this case had been guilty of the misconduct imputed to him, his partners would have had the power of putting an end to the partnership, without coming to this, or any other Court; or if there was a doubt as to their power in this respect, they could have obtained immediate relief in a Court of Equity. But, without giving the bankrupt any opportunity of being heard in a Court of Equity, in answer

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to the charge of misappropriation which they bring against him,—when he might possibly be able to clear himself from any imputation of that kind, and show sufficient cause why the partnership should not be dissolved,—they sue out this commission to effect that indirectly, which they ought, if they had acted *bonâ fide*, to have sought the accomplishment of by a wholly different proceeding. For these reasons it appears to me, that this is a commission issued for a fraudulent purpose, and ought, consequently, to be superseded.

Sir G. ROSE.—When the Lord Chancellor directed the two issues in this case, he proceeded, no doubt, on the well understood rule in bankruptcy, that the commission might be supersedable, on the ground of the motives that influenced the petitioning creditor in issuing it. For though the first issue, as to the debt, might be found in the affirmative, and therefore the commission be good in point of law; yet if, in the terms of the second issue, the commission had been taken out “for the purpose of compelling the petitioner to agree to a dissolution of the partnership,” the Chancellor must have contemplated the superseding of the commission. The very fact, that he ordered the question to be tried beyond the mere legal requisites, proves that he coincided in the general rule adopted by judges in bankruptcy in cases of this description, namely, that where a commission has been issued for an improper motive, the Court would not hesitate to supersede it. It is impossible to attend to the terms of this issue, and to the language of the finding of the

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jury, as it appears on the *postea*, without being satisfied that the object of the issue was to ascertain the real purpose of taking out the commission. But the counsel for the respondents put the strength of their case on the fact, that the jury have found "that the commission was not issued for the purpose of compelling the petitioner to agree to a dissolution of the partnership;" and that therefore the fact, upon which the mind of the Lord Chancellor was desirous of information, has been found for them. It is certainly difficult to account for the issue being so framed; for it appears to me, that this supposed method of accomplishing the intention of the party to bring about an agreement, tended most effectually to defeat it. The petitioner had put his case upon his petition intelligibly enough; for he says, "that the arrest was made in order to compel an agreement to a dissolution," which the arrest might very well do; and "that the *commission* was taken out" to work, as of course it would, the dissolution itself. The learned judge who tried the issue concluded most correctly what the essential point to be arrived at was; and having put that point specifically to the jury, they as specifically found that the purpose of suing out the commission was not to distribute the bankrupt's effects, but *merely* to put an end to the partnership. But putting the verdict entirely out of consideration, I do not think there is much room for doubt, as to the motive of the petitioning creditor. *Saunders* has not denied, that in arresting the bankrupt, and thus causing him to commit an act of bankruptcy, his object was to effect a dissolution of the partnership; for which, it appears, there were no

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grounds for applying to a Court of Equity. I agree with the arguments of the counsel for the petitioning creditor, that a Court of Law has nothing to do with the motives of a creditor in taking out a commission; but the Lord Chancellor sitting in bankruptcy has always been accustomed to inquire into his motives, and when the commission has been taken out with an improper motive, to treat it as an abuse of the process under the control of the great seal. It would seem, from what Mr. *Jacob* has advanced in argument, that all the law as to concerted commissions has been done away with since the passing of the Bankruptcy Court Act. But I find nothing in any section of the statute, that can be construed to that effect.

One thing will go a great way in deciding this case. It is laid down in all the cases in the books, that where a solicitor takes out a commission against a party who has no property to divide among his creditors, the commission is unduly and improperly issued, as not being issued for the distribution of assets. Now in this case a little attention to the proceedings will show, that there was not the remotest hope of administering property under this commission, and therefore that it could not have been issued with the slightest intention of distributing the effects, or of benefiting any of the bankrupt's creditors. The adjudication of the bankruptcy is advertized in the Gazette of the 8th of May, appointing the first and second meetings on the 12th and 13th of May. Now if there were any creditors of *Christie* desirous of proving at the second meeting to vote in the choice of assignees, these meetings seem to have been so contrived as to prevent the possibility of

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their doing so. Then the petitioning creditor, being the only creditor present at the second meeting, except the solicitor for the commission, who proves a debt for 34*l.*,—a debt, be it remembered, that was owing by the partnership, two of the partners being solvent,—elects himself and another person, his nominee, and no creditor, to be the assignees under the commission. No provision is even made for the payment of the expenses of the commission, which of course have been readily disbursed by the petitioning creditor.

An argument has been much relied upon for the respondents, that the commission could not have been sued out to put an end to the partnership, because the commission could not of itself dissolve the partnership. That, they contended, could only be done by the assignment, which has the effect merely of making the assignees tenants in common with the other partners. But this objection proves too much; for in all these cases, the question is as to the *effect* of the commission. If that were not so, the jurisdiction in bankruptcy has not been properly exercised. And although it is true, that the assignees become tenants in common with the solvent partner, yet that is in effect a dissolution of the partnership, by giving any party a right to wind up and determine it. Then, is it too much to say, that the petitioning creditor intended the commission to bring about that state of things, which was the inevitable result of working it? Or, can it be contended, under all the circumstances of the case, that he had any other object in view whatever, but to relieve himself from his situation as the bankrupt's partner. Viewing the matter in this, and no other light, I there-

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fore think that the order ought to be as prayed, and that the commission should be superseded at the costs of the petitioning creditor.

The order made was, that the commission should be superseded, and that the costs of superseding the same and incidental thereto, and also the costs of *Christie* of and occasioned by the original petition, and of the trials of the issues, and his costs of and occasioned by this application, should be paid by *Saunders*.

THIRD CASE.

Ex-parte CHRISTIE.—In the matter of CHRISTIE.

The decision in the last case, that a commission issued by one partner against another, for the sole purpose of dissolving the partnership, is supersedable, confirmed on appeal to the Lord Chancellor.

THIS was a special case, upon the appeal of *W. H. Saunders* to the Lord Chancellor from the decision of the Court of Review in the last case. The following is the statement of the special case: (*a*)

“ In November 1825 the said *Alexander Christie* and *William Henry Saunders* and *William Hoole* entered into partnership together, for a term of ten years, in the business of engineers and millwrights, at Sheffield, in the county of York, under the firm of *Alexander Christie & Co.*; and they carried on business in partnership till the year 1831.

(*a*) As this special case was settled by the Chief Justice, and the argument on the appeal, as well as the judgment of the Lord Chancellor, are grounded upon the statements contained in it, it has been thought more advisable to give it nearly *verbatim*, although most of the facts stated in the last case are necessarily repeated.

Independently of the partnership transactions, there were some other transactions between *Saunders* and *Christie*; and it was and is insisted by *Saunders*, that *Christie* had, in March 1830, become indebted to him, *Saunders*, to the amount of 100*l.* and upwards, in respect of such private transactions.

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In March 1831 *Saunders* commenced an action at law against *Christie*, and made oath that *Christie* was indebted to him to the amount of 103*l.* and upwards, and caused *Christie* to be arrested in such action.

Christie was committed to prison under such arrest, and could not procure bail, and remained in prison for more than twenty-one days.

After the expiration of such twenty-one days, and on the 30th of April 1831, a commission of bankrupt under the great seal was issued against *Christie*, upon the petition of *Saunders*. On the 2d of May 1831 *Christie* was found and declared a bankrupt under this commission.

On the 13th of June 1831, *Christie* presented his petition to the Lord High Chancellor, stating as therein stated, and insisting, that, on a fair and just balance of account, he was not indebted to *Saunders* in the sum of 100*l.*, but that, on the contrary, the debt actually due from him (*Christie*) to *Saunders* did not exceed 40*l.*, and was, as he was advised, not sufficient to support the commission; and that the commission was, as he verily believed, issued by *Saunders* solely for the purpose of obtaining a dissolution of copartnership between him (*Christie*), *Saunders*, and the said *William Hoole*, on the terms proposed by them, to the prejudice of him (*Christie*), and in order to defraud him of his

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share of the profits accruing to the said partnership concern; and that he was advised and submitted, that the issuing of the said commission by *Saunders* was fraudulent and vexatious, and that on that ground, as well as on the ground of the inadequacy of the petitioning creditor's debt to support the same, he was entitled to have the commission superseded, at the costs of *Saunders*. And the petition prayed, that the said commission of bankrupt might be superseded, and that a writ of supersedeas might issue accordingly, and that the costs thereof, and of that application, might be paid by *Saunders*: and that the bond of *Saunders*, the petitioning creditor, might be assigned to him (*Christie*).

Several affidavits were sworn and filed in support of and in opposition to the petition; that is to say, the affidavit of, &c. &c. (here the names of the several deponents who had made affidavits were enumerated,) which said several affidavits are hereby referred to.

The petition came on to be heard before the Lord High Chancellor on the 31st of August 1831, when, by consent of the parties, it was referred to a barrister to take the account between *Christie* and *Saunders*, and to inquire and certify whether *Saunders* had a good petitioning creditor's debt to support the commission. It was afterwards agreed between the parties, that this reference should be abandoned; and the petition came on again to be heard before the Lord Chancellor.

His lordship, by an order made upon the said petition, and dated the 10th day of January 1832, was pleased to order, that the parties should forthwith proceed to a trial at law, at the assizes of the county of

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York, in his majesty's Court of King's Bench, upon the following issues: viz. *first*, whether, at the date and issuing forth of the said commission of bankrupt against *Christie*, *Christie* was justly and truly indebted to *Saunders* in the sum of 100*l.*; and *secondly*, whether the said commission of bankrupt was issued for the purpose of compelling *Christie* to agree to a dissolution of the partnership subsisting between him and *Saunders* and *William Hoole*: in the first of which issues *Saunders* was to be the plaintiff, and *Christie* was to be the defendant; and in the second of which issues *Christie* was to be the plaintiff, and *Saunders* was to be the defendant. And it was referred to the master of the Court of Chancery in rotation, to settle the said issues between the parties if they differed about the same, with liberty for the judge, before whom such issues should be tried, to indorse on the postea any special circumstance as he might think fit; and all further directions were thereby reserved until after the trial of such issues, when either party was to be at liberty to apply to his lordship in relation thereto, as they might be advised, when such further order was to be made as should be just.

The said two issues came on to be tried at the Summer assizes for the county of York, in the year 1832, before Mr. Justice *Parke*; when, on the *first* issue, a verdict was found for *Christie*, the defendant on such issue; and on the *second* issue, in which *Christie* was plaintiff, a verdict was found for *Saunders*, the defendant; and the judge indorsed upon the postea as follows: (The case then stated the special indorsement on the postea, as in the last case.) (a)

(a) See ante, 467.

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On the 19th day of November 1832, *Christie* presented his petition to the Court of Review, stating the former petition, and the result of the trial of the issues, and praying that the commission might be superseded, that a writ of supersedeas might issue accordingly, and that the costs thereof and of the former petition and consequent charges thereon, and the costs, charges, and expenses incurred by *Christie* upon and relating to the said trial of the said issues, might be paid by *Saunders*, and that the bond might be assigned.

On the 28th of November 1832, *Saunders* applied to the Court of Review for a new trial (a) of the first issue; and upon hearing the learned judge's notes, and the counsel of *Saunders* and *Christie*, the said Court of Review declared its opinion, that the verdict upon the said first-mentioned issue was not satisfactory, and that it would direct a new trial of the said first issue, or some other inquiry, for the purpose of determining the validity of the said petitioning creditor's debt, unless the Court should, upon hearing the petition of *Christie*, be of opinion that the commission ought to be superseded, upon the grounds appearing on the special indorsement on the postea upon the second issue.

On the 29th November 1832, the petition of the said *Alexander Christie* came on to be heard before the said Court of Review, and the case was argued before the Court with reference to the question, whether the said commission ought to be superseded, by reason of the purpose for which the same was, or appeared to have been, issued. And the Court, upon reading the notes of the evidence given upon the trial

(a) See the first case, *ante*, p. 461.

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of the second issue, and the special finding of the jury as indorsed upon the postea by the learned judge, and also the affidavits filed in the matter of the petition, was of opinion, that in point of fact the said commission of bankrupt had been taken out by the said *William Henry Saunders*, not with any intent or purpose to cause the estate and effects of the said *Alexander Christie* to be distributed amongst his creditors in payment of their debts, but merely with the intent and purpose to put an end to the partnership subsisting between the said *Christie, Hoole, and Saunders*; and held, that such proceeding was an abuse of the great seal, and therefore that the commission ought to be superseded; and thereupon by its order, dated the 29th day of November 1832, ordered, that the said commission should be superseded, and the costs of superseding the same and incidental thereto, and also the costs of *Christie* of and occasioned by the said original petition, and of the trials of the said issues, and his costs of and occasioned by that application, should be paid by the said *William Henry Saunders*.

From this decision *Saunders* appeals to the judgment of the Lord High Chancellor, humbly submitting that the said commission ought not to have been superseded.

Settled and approved by me,

T. Erskine, C. J."

Sir *E. Sugden* and Mr. *Jacob* appeared for the appellant. The grounds on which the bankrupt founded his original petition to supersede the commission were:

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1st, That there was not a sufficient petitioning creditor's debt: and 2dly, That the commission was issued "for the purpose of dissolving the partnership, and to defraud the petitioner of his share of the profits." There are two objections to the decision of the Court of Review: 1st, That the issue has been found in favour of the appellant; and 2dly, That a commission is not supersedable, where it has the legal requisites, and fraud is negatived, although the object may be to dissolve a partnership.

First, As to the finding of the issue. When the Court directed this issue, it was not meant to try whether the commission was sued out to put an end to the partnership, as the judge put the question to the jury, and which is the legal result of every commission regularly proceeded with; but to ascertain, whether it was issued to *compel* a dissolution on certain terms proposed by the petitioning creditor. Now the jury have, in the express negative of the terms of the issue, found that the commission was *not* issued for the purpose of compelling the petitioner to agree to a dissolution of the partnership. But the Court of Review has wholly disregarded this finding, and decided upon the special indorsement on the postea, which was merely collateral. The order of the Lord Chancellor, however, only gave the judge liberty to indorse any special circumstances as to the issue directed to be tried, and not to vary the terms of the issue itself, which it appears he has done, by the findings of the jury indorsed on the postea. These findings are, in truth, wholly beside the question which the parties went prepared to try.

Secondly, Even supposing that the object of issuing

the commission was to dissolve the partnership, yet where the legal requisites exist, and there is no fraud, as is expressly negatived in this case, a partner is not to be deprived of his legal right to sue out a commission, because he may derive from it some further benefit than as a mere creditor, namely, that of getting rid of a bad partner. When any person has a legal right, Courts of Law will not limit that right, because the party exercising it is actuated by a bad motive; nor will a Court of Equity interfere with a legal right, unless the fraudulent motive is clearly apparent.

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The cases, which were cited in the Court below in support of the supersedeas, are inapplicable to the real question before the Court. *Ex parte Brown* (a) was not an application by the bankrupt, but by the widow of a deceased partner of the bankrupt, where the bankrupt was solvent; and the commission had been procured by the bankrupt, to defeat her of her interest in the partnership. It was therefore a clear case of fraud, and quite different from the present case. In *Ex parte Harcourt* (b), also, Lord Eldon's judgment proceeded entirely upon the commission having been issued against good faith; and the same in *Ex parte Gallimore* (c), where his lordship said, that process in bankruptcy was affected by the same species of fraud, which would invalidate the process in any other Court. So that it would appear, from these cases, that a commission of bankrupt is only to be controlled in a case of fraud, in the same way as a Court of Law would interfere to prevent the abuse of its own process.

(a) 1 Rose, 151.

(b) 2 Rose, 214.

(c) 2 Rose, 424.

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But in the case of *Ex parte Wilbeam* (a), where fraud was negatived, as in the present case, Sir J. Leach refused to supersede a commission, notwithstanding it was issued by the petitioning creditor in concert with the bankrupt's partners, with a view of dissolving the partnership. His honour says: "The petitioning creditor appears to have considered it to be a prudent measure, to get the bankrupt out of a partnership with which he had extensive dealings. Taking this *bonâ fide* to be his object, it cannot defeat the commission. A commission is not to be superseded, because the petitioning creditor has a bye motive beyond the distribution of the estate." So in *Ex parte Bourne* (b),—where the commission was originally issued for an improper purpose, but that purpose being defeated, the petitioning creditor asserted his right to work the commission for the purpose recognized by law, namely, for the benefit of himself and the other creditors of the bankrupt,—Sir J. Leach said, "If a commission issued upon an unjust motive becomes an efficient instrument of fraud, and the bankrupt cannot be relieved from the fraud of which the commission is an instrument, but by superseding the commission, the Court will interfere and supersede the commission, in order to defeat the fraud; but however unjust the motive of the petitioning creditor may be, if the fraudulent purpose may be defeated without superseding the commission, the Court will not interfere." And although Lord Eldon afterwards reversed that decision, upon appeal, yet he admits that a commission may be issued with a double object. [But Lord Eldon

(a) Buck, 461.

(b) 1 G. & J. 311.

says, that the distribution of the bankrupt's effects is the only legitimate object of a commission.] That is the necessary consequence of a commission. In the present case, the judge might just as well have asked the jury to say, whether the commission was issued with an intention that an assignment should be made of the bankrupt's estate and effects, as to ask whether the purpose was to distribute those effects. What a situation would a trader be placed in, if he could not issue a commission against his partner, after he had committed an act of bankruptcy! Put the case of a young man admitted as a partner in a banking house, who enters into speculations in the name of the firm, which would involve the other partners in ruin, unless they immediately dissolved the partnership. Is it to be said, that one of his partners, who is a creditor for 100% and upwards, is not to issue a commission against him, because his governing motive is to effect a dissolution of the partnership, and prevent the house from being ruined by the extravagance of the bankrupt? Such a doctrine as this would be most unreasonable and unjust. In the present case, there is no evidence whatever that the petitioning creditor did not intend to work this commission, and therefore what Lord Eldon says, in *Ex parte Bourne*, is applicable to this case. His words are, "if the object of the commission is to put a stop to an action, and at the same time to prosecute the commission, with a view to the distribution of the estate amongst all the creditors, I will not say that a commission with such double object should not stand." In conclusion, therefore, we submit, 1st, That even supposing the Court should decide the indorsement of the judge upon the *postea*

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to be correct, yet as there is *no fraud* found, to warrant the supersedeas, the judgment of the Court of Review must be reversed. And *secondly*, if your lordship should think that the special finding on the *postea* was, as we contend it is, inconsistent with the terms of the issues, then that you will not act upon such finding, in direct opposition to the previous verdict of the jury.

Mr. *Swanston*, and Mr. *Montagu*, for the respondent. It has been contended on the other side, that it would be unjust to prevent one member of a partnership from issuing a fiat against a partner who has committed an act of bankruptcy, because the continuance of the partnership might involve all the members of it in ruin. But this is merely an imaginary evil; for the proper remedy in such a case would be to file a bill in equity for a dissolution of the partnership, and not by the indirect proceeding of issuing a fiat in bankruptcy. "The real question," as Lord *Eldon* says, in *Ex parte Bourne* (a), "results to this, What was the purpose with which this commission was issued?" In a subsequent part of his judgment, also, he adds, "I think myself justified in saying, and bound to say, that if the object of this commission was to stay the action, and not to work the commission, as a commission for the benefit of the creditors, this Court will not permit it to stand." It has also been urged in support of the argument for the appellant, that if the legal requisites for a commission exist, the Court will not regard the motives of the petitioning creditor. But though a Court of Law may not look at the motives of

(a) 2 G. & J. 140.

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a creditor, who avails himself of its process against his debtor, and who has only his own interest to consider in the proceeding, yet it can never be contended that so severe a process as a commission of bankrupt, which the law has provided for the benefit of the general body of the bankrupt's creditors, may be issued by any individual for his own exclusive benefit; or that when it has been thus obtained by a creditor by concealing his motive, this Court will refuse to supersede it when the motive is discovered. *Ex parte Bourne* (a), which has been so often referred to in this argument, is a decided authority against such a position.

With respect to the finding of the jury, as indorsed on the *postea*, we contend there is quite sufficient found by the jury to satisfy the conscience of the Court, and to enable it to decide in favour of the supersedeas. For, however informal the *postea* may be considered, the Court will not suffer itself to be fettered by any defect of form, but will only regard the substantial justice of the case. After the trial of an issue directed by the Court, if it is not quite satisfied with the verdict, the Court will, upon further directions, look at all the evidence originally before it, as well as the evidence appearing upon the trial of the issue; and if the result of the inquiry proves still unsatisfactory, the Court will disregard the verdict, or even overrule the decision of a Court of Law, upon a case sent for its opinion: *Uttersen v. Vernon* (b), *Hampson v. Hampson* (c). And in *Stace v. Mabbot* (d), a very remarkable case is referred to by Lord *Hardwicke*, which occurred before Lord *King*; where there had been no less than five trials in

(a) 2 G. & J. 141.

(b) 3 T. R. 539; 4 T. R. 570.

(c) 3 V. & B. 42.

(d) 2 Ves. 554.

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favour of the validity of a deed alleged to have been forged, and in spite of all these verdicts Lord King decreed it to be cancelled, as the trials were unsatisfactory to his own mind. In directing the issue in the present case, the Court permitted any special circumstances to be indorsed by the judge upon the *postea*, as he might think fit. This reservation was intended to prevent the object of the Court from being defeated by a return of part, instead of the whole truth of the case. That object, therefore, having been now attained, by the judge's indorsement upon the *postea*, and the Court, having before it the whole of the evidence upon the trial, and the affidavits upon the original petition, can have no doubt as to the real facts of the case, and will therefore not permit a commission to stand, which has been issued for the mere purpose of dissolving a partnership.

Sir *Edward Sugden* in reply. The law is not disputed, that a commission is supersedable, if it be issued for a fraudulent purpose, or if the petitioning creditor has no intention of working it as a commission. But in this case fraud is expressly negatived, even by the indorsement on the *postea*, which is so much relied on by the other side; and there is no evidence that the petitioning creditor did not intend to work this commission, except the inference that may be drawn from the indorsement on the *postea*, which was made by the learned judge, under the mistaken notion that the issue directed was not the real issue intended to be tried. In order to justify the superseding of this commission, it ought to have been expressly proved that *Saunders*, when he issued it, had no intention to work it;

and if this had been shown, it would have destroyed the argument of the other side; for if there was no intention to work the commission, it could not have been issued for the purpose of putting an end to the partnership; as it is the assignment, and not the commission, which effects the dissolution. If, upon the proceedings as they now appear, the Court should not feel itself justified in reversing the order of the Court of Review, then we submit that the appellant, on the ground of surprise, ought to have an opportunity of producing further evidence, either upon a new trial, or some other inquiry which the Court may think proper to direct.

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Cur. adv. vult.

LORD BROUGHAM, L. C.—The frame of the second issue, which I directed in this case, appears not to have been distinctly understood by the learned judge who tried it (a); for he seems to have considered that the

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(a) It may be permitted to observe, nevertheless, that the terms of the issue are, to say the least of them, wrapped up in somewhat of an ambiguous phraseology. As well indeed might it be said, when a man is arrested, who refuses to pay a debt, and who prefers imprisonment to payment, that the writ was issued against him for the purpose of *compelling him to agree to pay the debt*,—as that the commission in this case was issued against the petitioner, who had already positively refused to dissolve the partnership, for the purpose of *compelling him to agree to a dissolution*; when all *agreement* was out of the question, and nothing was contemplated by the petitioning creditor, but the legal effect of the commission, which would, independently of any agreement, of itself *compel a dissolution*.

Whether the learned judge understood the meaning of the issue which was sent to him to try, will be best seen from the mode in which he charges the jury, preparatory to their verdict. According to the short-hand writer's notes, it appears that he told them, that the terms of the issue did not convey the real facts and circumstances which the Lord Chancellor wished to be tried; for that even if the purpose of suing out the commission was to compel the plaintiff to agree to a dissolution of the partnership, they

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only object was to ascertain whether or not the sole purpose of the petitioning creditor was to dissolve the partnership; whereas the chief object I had in view, when this matter was last before me, was to have it ascertained, whether or not the commission had been issued by *Saunders* to compel his partner, *Christie*, to agree to a dissolution of the partnership; because there could be no doubt whatever, if such was *Saunders's* intention, the commission would be wholly void. One event, therefore, of the trial would at once have disposed of the whole question, though the other event would not have been equally decisive. I was therefore strongly inclined to direct a third issue, to ascertain the matter to which the indorsement on the *postea* relates; but after attentively considering the evidence in the

could not say that that was the object, looking at the terms of the issue; as it was by virtue of the assignment, that the partnership would be dissolved, and not by *Saunders* suing out the commission and holding it *in terrorem* till the plaintiff agreed to dissolve the partnership. He observed, there was no evidence that any stipulation had been made by the defendant not to open the commission, if the plaintiff would dissolve the partnership; but, on the contrary, that he proceeded to open the commission, without any such proposal, and that the partnership was, therefore, dissolved by operation of law. For these reasons, the learned judge directed the special indorsement on the *postea*, in order, as he said, to meet the wishes of the Chancellor, and to terminate the disputes between the parties. Now, if the learned judge had not directed the jury to find as they did, the expense of a third issue would have been unavoidable, to ascertain this simple fact, namely, what was the petitioning creditor's real motive in issuing the commission. For, notwithstanding the jury might find that the commission was not issued for the purpose of compelling the bankrupt to agree to a dissolution of the partnership,—a verdict, indeed, which they could not in strictness return, unless there had been evidence that the petitioning creditor abstained from working the commission, and hung it out merely *in terrorem* over the bankrupt to induce him to agree to such dissolution,—yet, *non constat*, that it was not issued with the sole object of effecting a dissolution of the partnership, in spite of the refusal of the bankrupt to enter into any agreement for that purpose.

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cause, both in this Court and at the trial, as well as that which appears on the face of the proceedings under the commission, and having also conferred with the learned judge who tried the cause, I think there is no doubt of the material facts of the case,—that those facts are as found by the jury, and that I am justified in considering the case as standing thus: the petitioning creditor, *Saunders*, did not issue the commission for the purpose of compelling *Christie* to agree to a dissolution of the partnership subsisting between him and *Saunders*, and without any view of further working the commission. Neither did he sue it out to take an undue advantage over *Christie* in settling the partnership affairs, nor to obtain the partnership business for himself and his other partner *Hoole*. But he did sue out the commission, not for the purpose of causing the bankrupt's effects to be distributed amongst his creditors, but for the sole purpose of putting an end to the partnership. Therefore, though it is not proved that he had no intention of working the commission, it is certain that he only intended to work it so far, and no further, as might be necessary for accomplishing his sole and governing purpose of effecting the dissolution of the partnership. It is true, that the suing out a commission of bankrupt is a matter of right; but this Court has always kept such a control over the proceedings under it, even in the earliest stage of them, as to see that there has been no abuse of its process. And while in Courts of Law, which have no jurisdiction but to inquire how far the provisions of the statutes have been complied with, a commission has been held valid, which has the legal

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requisites to support it; yet, in this Court, the conduct of the party having the carriage of the commission has always been subject to review; and the whole proceedings, how firm soever at law, have been set aside, if the powers given by the commission have been perverted by the petitioning creditor to purposes foreign to its legitimate object. It was upon this principle, that Lord *Loughborough* superseded the commission which had been issued against Mr. *Bowes* (a), on an act of bankruptcy committed above ten years previously; it being plain, that the object of the petitioning creditor in taking out the commission was to help him in some other proceedings, which he had instituted against the bankrupt. There is nothing, however, in the bankrupt law, which prevents a stale demand from being made the ground of a commission, or prohibits a creditor, who is engaged in other legal proceedings, from obtaining the benefit of a commission, under which he may be sure of being chosen assignee. Yet because, in Mr. *Bowes*' case, it was apparent that the general relief of creditors was not the object of the commission, but merely to determine a particular question between the bankrupt and the petitioning creditor, and it was plain that the petitioning creditor would be able to give himself the whole management of the bankruptcy, Lord *Loughborough* superseded it. In *Ex parte Bourne* (b), also, Lord *Eldon* (referring to this decision of Lord *Loughborough*) observes, that if a commission be taken out for a particular purpose only, it is an abuse of the great seal, and cannot stand. The constant practice of superseding a commission, though perfectly valid at law, on the ground of concert, rested

(a) 4 Ves. 168.

(b) 2 G. & J. 142.

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on the same principle, and required a provision of the legislature to abolish it. The uniform rule, then, I take to be this:—If a commission is issued for a purpose wholly foreign to the object of the bankrupt law, such as to stay an action, determine a lease, or dissolve a partnership, it shall not be permitted to stand; because the process of the great seal has been abused, in being perverted to a purpose it was never designed to serve. There may be cases, I admit, in which different motives may combine to influence the petitioning creditor, and more objects than one may be attained by a commission, and yet the Court will not interfere, if there has been no fraud, or other improper conduct on the part of the petitioning creditor, notwithstanding he may have been actuated by other motives, besides those of distributing the bankrupt's estate. Such was the case of *Ex parte Wilbeam* (a), where bye-motives, as they were termed, mixed themselves with the intentions of the party who issued the commission. And in *Ex parte Bourne* (b), Lord Eldon purposely abstains from saying "what would be the law, if there was a double purpose, one of which was consistent with the legitimate objects of a commission."

There is no need to dwell more on the cases relating to this question; for excepting the *dictum*, rather than the decision, of Sir J. Leach, in *Ex parte Bourne* (c), in which Lord Eldon did not concur, and the language used by the same learned judge in *Ex parte Wilbeam* (d), which was several years anterior to *Ex parte Bourne*, there is nothing to be met with in the books, which tends in any degree to relax the rule, that

(a) 5 Mad. 3; S. C. Buck. 459.

(b) 2 G. & J. 142.

(c) 1 G. & J. 316.

(d) Buck, 459.

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a commission of bankruptcy is supersedable, if it is sued out merely to dissolve a partnership.

The conduct of the petitioning creditor in this case being worthy of no approbation, he must pay the costs both of the proceedings in the Court below, and of this appeal.

Judgment affirmed, with costs.

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Ex parte LLOYD.—In the matter of **BAKER.**

Costs of the application to substitute another debt for the debt of the petitioning creditor, ordered to be paid by the petitioning creditor.

THIS was a petition under the 18th section of 6 *Geo.* 4. c. 16., praying to substitute the debt of a creditor who had proved, for the debt of the petitioning creditor, the latter being found insufficient to support the fiat. The petitioning creditor, it appeared, was an assignee under another bankruptcy; and the only question in this case was, whether the costs of this application should be paid by the petitioning creditor, or out of the estate of the present bankrupt.

Mr. *Montagu*, in support of the petition, cited the case of *Ex parte Hall* (a), where the Vice-Chancellor ordered the costs to be paid out of the bankrupt's estate.

The COURT, however, thought that the costs of the application should, under the circumstances of this case, be paid by the original petitioning creditor, and not imposed on the estate of the present bankrupt.

(a) Mont. & M. 39.

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Ex parte HUNTER.—In the matter of BLAGBURN.

THIS was a petition similar to that in the last case; but though the Commissioners had found the petitioning creditor's debt insufficient to support the fiat, they did not find, that the debt proposed to be substituted was incurred *not anterior* to the debt of the petitioning creditor.

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When the Commissioners find the petitioning creditor's debt insufficient to support the fiat, they should also expressly find, that the debt proposed to be substituted was incurred not anterior to the petitioning creditor's debt.

The COURT, therefore, made an order to refer it back to the Commissioners, to inquire whether the debt proposed to be substituted was anterior, or not, to the debt of the petitioning creditor, in point of contract,—and if not, then the order of substitution to be drawn up accordingly.

Ex parte HUDSON.—In the matter of ROCHE.

THIS was a petition of the assignees against the solicitor to the commission, praying for an order on him to deliver up the proceedings to the petitioners, as well as to pay over to them certain monies which he retained in his hands. There was an affidavit that no lien was claimed by the solicitor for the detention of the proceedings, and that the amount of his bill had been paid; notwithstanding which he refused to deliver up the proceedings, or pay over the money.

Same day.

Order made on the solicitor to deliver up the proceedings, and pay over monies to the assignees.

Mr. *K. Parker* appeared in support of the petition.

The COURT made the order as prayed, referring it to Mr. Commissioner *Williams*, to ascertain the amount of the balance due from the solicitor, and directing him to pay the costs of this application, and of the subsequent inquiry.

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By a deed of composition entered into by the bankrupt with his creditors, dated 5 September 1831, he agreed to pay them 10s. in the pound by two instalments of 5s. each; in consideration of which the creditors covenanted to release him from his debts, as soon as both instalments were paid. This deed was executed only by the major part of the creditors.

After the payment of the first instalment, on the 31st October 1831, a commission issued on an act of bankruptcy committed in June 1831.

Held, that the creditors, who had received the first instalment, were entitled to prove for the residue of their debts, without refunding the amount of the instalment.

Ex parte ROBERT WOOD.—In the matter of HENRY WOOD.

THIS was the petition of a creditor of the bankrupt, praying that another creditor of the name of *John Brown* might be ordered to refund to the assignees what he had received under a deed of composition which he and some other creditors had entered into with the bankrupt, and that his proof already made might be expunged; with liberty for him to prove his original debt, on refunding the amount of the composition. The petition stated, that when the matter was brought before Mr. Commissioner *Holroyd*, he ordered the following special case to be drawn up for the opinion of this Court.

“ In the Court of Bankruptcy.

In the matter of *Henry Wood*, a bankrupt.

A special case for the opinion of the Court of Review, settled and agreed upon between *Robert Wood*, of Perry Hill Cottage, Warplesden, in the county of Surrey, Esquire, a creditor of the said bankrupt, who has not received any portion of the composition hereinafter mentioned; and *John Brown*, of Great Surrey Street, Blackfriars Road, fringe maker, on behalf of himself, who has, and the said *John Brown* and *Thomas Legg*, as assignees of the estate and effects of the said bankrupt; and approved by *Edward Holroyd*, Esquire, the Commissioner acting in the said commission, in pursuance of an order made by the said Commissioner, with the consent of the said *Robert Wood* and *John Brown*, and of the said assignees, at a meeting of the

creditors of the said bankrupt, originally held on the 2d day of July 1832, and held by adjournment on the 1st day of August 1832.

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The said bankrupt, on the 22d August 1831, called his creditors together, when he communicated to them his inability to pay his debts in full, and proposed to them that they should accept the sum of 10s. in the pound on the amount of their respective debts, to be paid in two instalments of 5s. each; the first instalment to be paid on the execution of a deed of compromise, and the other at a subsequent period; such second instalment to be guaranteed by a friend of the said bankrupt. The majority of the creditors present at the meeting acquiesced in the proposed arrangement.

In pursuance of such arrangement, a deed of compromise was prepared by the solicitors of the said bankrupt, and is in the words and figures following; that is to say, " This indenture, made the 5th day of September, in the year of our Lord 1831, between *Henry Wood*, of Jermyn Street, St. James's, in the county of Middlesex, upholsterer, of the first part; *Herbert Wyatt*, of Earl's Court, Brompton, in the said county of Middlesex, esq. of the second part; and the several other persons whose names are hereunto subscribed and seals affixed, creditors respectively of the said *Henry Wood*, of the third part. Whereas the said *Henry Wood* is indebted to the said several persons, parties hereto, of the third part, in the several sums of money set opposite to their respective names, which he is unable to pay; and the said several persons have agreed to accept a composition of 10s. in the pound

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upon their said debts, to be paid by two instalments of 5s. in the pound each on the days hereinafter mentioned; and the said *Herbert Wyatt* hath agreed to secure the payment of the last instalment in manner hereinafter mentioned. Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the said several debts so owing to them as aforesaid, the said *H. Wood* doth hereby, for himself, his heirs, executors, and administrators, covenant with the said several persons hereto of the third part, and with each and every of them, and each and every of their heirs, executors, and administrators, that he the said *H. Wood* shall and will, on or before the 19th day of September now next, pay to each of them the said several persons, parties hereto of the third part, so much money as will be equal to 5s. in the pound upon the amount of their said respective debts; and also shall and will, before the 19th day of April now next, also pay to each of them a further sum of money, equal to 5s. more in the pound, upon the said amount of their respective debts; so that each of the said several persons shall, in manner aforesaid, receive an amount equal to 10s. in the pound upon the amount of his, her, or their debts. And in further pursuance of the said agreement the said *Herbert Wyatt* doth hereby, for himself, his heirs, executors, and administrators, covenant with the said several persons parties hereto of the third part, and with each of them, and each of their executors, administrators, and assigns, in manner following; that is to say, that the said *H. Wood*, his heirs, executors, or administrators, shall and will, on or before the said 19th day of April next, well and

truly pay to each of the several persons parties hereto of the third part, the said two instalments of 5s. in the pound upon the said amount of their said respective debts; and in case of the said *H. Wood* making default in such last-named payment, then that he the said *Herbert Wyatt* shall within 14 days next after such default pay to each of the said several persons the amount of the said second instalment. And in pursuance of the said agreement, and in consideration of the covenant hereinbefore entered into by the said *Henry Wood* and *Herbert Wyatt*, they the said several persons, parties hereto of the third part, do hereby severally and respectively, but not the one for the other or others of them, but each one only for himself and his own heirs, executors, administrators, partners, and assigns, covenant with the said *H. Wood*, his executors and administrators, in manner following; that is to say, that they the said several persons, parties hereto of the third part, shall and will, and do hereby accept and agree to receive the said sum of 10s. in the pound on the amount of their said respective debts, to be paid by the instalments and on the days and in manner hereinbefore mentioned, as a composition on, and in full discharge and satisfaction of, their said respective debts, and of all claims, actions, suits, judgment or demands against the said *H. Wood* in respect thereof; and that if the said instalments shall be paid in manner hereinbefore provided, then that they the said several persons, parties hereto of the third part, shall and will, if thereunto required by the said *H. Wood*, but nevertheless at the costs and charges of the said *H. Wood*, execute to the said *H. Wood* one or more sufficient releases and discharges from their said

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respective debts, and of and from all claims, bills, securities, actions, suits, judgments, and demands in respect thereof. And the said several persons, parties hereto of the third part, do hereby, in manner and form aforesaid, further covenant with the said *H. Wood*, that until default shall be made in payment of the said composition by the instalments, and on the days hereinbefore mentioned, they the said several persons, parties hereto of the third part, shall not, nor shall or will any or either of them, sue, arrest, attach, imprison, or otherwise molest, in any manner howsoever, the said *H. Wood*, his executors or administrators, in respect of their said respective debts, or any or either of them, or for or in respect of any bill, note, security, matter or thing relating thereto or connected therewith.. Provided always, and it is hereby expressly agreed and declared by and between the said parties hereto, that if it shall happen that the said first instalment of 5s. in the pound shall not be paid by the said *H. Wood* on the day and in manner hereinbefore mentioned, then and in such case the covenants and agreements hereinbefore contained, and the said security hereby given by the said *Herbert Wyatt*, and every matter, clause, and thing, and all the covenants and agreements hereinbefore contained, shall cease and determine; and the said several persons, parties hereto of the third part, shall thenceforth severally be, in all respects, in the same position, with respect to the said *H. Wood*, as they respectively would have been if these presents had not been made. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written."

The said deed of compromise was executed by the said bankrupt and by the said *Herbert Wyatt*, and also by the said *John Brown*, and by a majority of the bankrupt's creditors, before the issuing of the commission of bankrupt hereinafter mentioned; but the said *Robert Wood* refused to execute it, and in fact he and others of the creditors of the said bankrupt never executed it. The said *John Brown*, and such of the other creditors who did execute the said deed, immediately upon the execution thereof, received a sum of money on account of their respective debts, equal to 5s. in respect of each pound of his debt. The said arrangement with the bankrupt's creditors, and the payment of the money to them, was open and notorious. A commission of bankrupt duly issued against the said *H. Wood* on the 31st day of October 1831, and under it the said *H. Wood* was duly found and adjudged a bankrupt. The act of bankruptcy, on which the Commissioners under the said commission found and adjudged the said *H. Wood* to be a bankrupt, was committed in the month of June 1831. The said *John Brown* and *Thomas Legg* have been duly appointed assignees under the said commission. The said *Robert Wood* has duly proved a debt of 443l. 13s. 2d. against the estate and effects of the said bankrupt, under the said commission, and other creditors of the said bankrupt, who have not entered into or received any money in respect of the said proposed compromise, have also proved their debts against the said estate. The said *John Brown* has proved a debt under the said commission, as due to himself from the estate and effects of the said bankrupt, to the amount of 72l. 18s.; and which sum of 72l. 18s. is the residue of the sum of 96l. 15s. 4d., which was the

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amount due to the said *John Brown* at the time of executing the said deed of compromise of the 5th day of September 1831, after deducting therefrom the sum of 23*l.* 17*s.* 4*d.* the first instalment of the said compromise, at the rate of 5*s.* in every pound. Several others, who were the creditors of the said bankrupt, and who executed the said deed, and received the said instalment of 5*s.* in the pound on their respective debts, have proved against the estate of the said bankrupt the amount which remained, after deducting the respective amount received by each in respect of such instalment, from the amount to them respectively due at the time of executing the said deed. It was submitted by the counsel of the said *R. Wood* to the said Commissioner, that the creditors of the said bankrupt were bound to refund the several sums of money received in respect of the said proposed compromise, or to retain only so much thereof as would be equivalent to the amount which they respectively would be entitled to receive out of the estate and effects of the said bankrupt, by way of dividend upon their respective debts; and that the proofs of such creditors ought to be expunged, unless they should submit to comply with such equitable arrangement. On the part of the said *John Brown*, it was submitted, that the said *John Brown* was entitled to retain the said sum by him received, and that the proof of the said *John Brown* should stand, so as to entitle him to receive a dividend on the amount proved by him. Whereupon the said Commissioner was pleased to order, that the said meeting should stand adjourned until the 3d day of December 1832; and it was agreed, with the approbation of the said Commissioner, that a special case should be stated, in order that the opinion

of your Honors might be ascertained, whether the said *John Brown* is entitled to retain the said composition, and to receive a dividend on the amount of the debt proved by him; or whether he should refund what he has so received, and prove the original amount of his debt.

“ I approve of the case as above stated.

“ *Edward Holroyd*, 22nd November 1832.”

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Mr. *Wilcock*, in support of the petition, contended, that as the act of bankruptcy, which was committed in June 1831, preceded the bankrupt's final arrangement with his creditors, the deed of composition, being executed in September 1831, was consequently void. [*Erskine*, C. J. The question is here, whether the Court has jurisdiction to order the parties to refund.] It appears, from the statement in the case, that the amount of the first instalment of 5s. in the pound was paid to *Brown* by the bankrupt, after he had committed an act of bankruptcy; and he was therefore not entitled to receive any dividend under the commission, until he had refunded what he had received under the composition deed. [Sir G. *Rose*. In *Ex parte Ackroyd* (a) it was determined, that the proof of a debt, which must at all events be due, is not to be rejected, because there is a question to be tried between the bankrupt's estate and the creditor, although it might be proper that no dividend should be paid on that proof until the question was determined.] I contend, that the deed in this case was inchoate, and not complete, until every creditor had executed it; and as the petitioner and many of the other creditors refused to be parties to it, it was entirely

(a) 1 G. & J. 391.

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defeated by the subsequent bankruptcy. But the deed was, moreover, void, as being in contemplation of bankruptcy; and the payments under it were a fraudulent preference of particular creditors, and therefore not within the protection of the 82d section of the 6 Geo. 4. c. 16. If the deed, however, is not considered void, it must operate at least as a merger of the simple contract debt. The creditors, therefore, who are parties to this deed, cannot take the benefit of the deed and the commission also; they must either refund the 5s. in the pound already received, and prove for the whole amount of their respective debts,—or else they must only prove for the amount of the remaining 5s. in the pound. They ought to be compelled to make their election, and not be preferred to the rest of the creditors who refused to be parties to the deed.

The COURT thinking that they had no jurisdiction to make any order as to refunding the money, unless all parties consented,

Mr. *G. Richards*, who appeared on behalf of the creditor *Brown*, and the assignees, thereupon intimated that he should advise them to consent to any order which the Court might think proper to make. He was then stopped by the Court.

ERSKINE, C. J.—The payment made by the bankrupt under this deed is not, as has been contended for, a payment in contemplation of bankruptcy, but a payment to prevent bankruptcy; nor does it appear that the creditors, who were parties to the deed, had any notice of a prior act of bankruptcy, or that there was

any intention on their part to obtain a fraudulent preference over the rest of the bankrupt's creditors. The question is, therefore, whether the payment of 5s. in the pound, which the bankrupt has made under this deed, is not protected by the 82d section of the Bankrupt Act, which declares that "all payments really and *bonâ fide* made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor,) shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed." Now, as there is nothing in this case to show, that there was any fraudulent preference of the creditor, I am of opinion, that the payment is protected by the statute, and that *Brown* cannot be called on to refund what he has received under this deed.

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Sir J. Cross concurred.

Sir G. Rose.—This petition really amounts to nothing more, than an action of assumpsit for money had and received, brought by the assignees against the creditor *Brown*. Now, in order to enable the assignees of a bankrupt to recover back from a creditor money paid to him by the bankrupt, they must prove the money to have been paid as a fraudulent preference of the creditor. A jury would therefore in this case be directed to consider, whether the payment in question was a payment made by a trader under such circumstances, as would induce a reasonable contemplation of bankruptcy. Then, is there any thing in this deed,

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from which we can infer that the contract is at an end, because there has been a bankruptcy? It has been said, that the deed, if valid, would operate as a merger of the simple contract debt. But the deed is, in fact, nothing more than a collateral security. There are not only no words of actual release contained in it, but there is not even a covenant for a release. I therefore think, that we cannot prevent any of the creditors, who are parties to it, from proving the balance still remaining due to them on their respective debts, that is, to the amount of 15s. in the pound. The case of *Ex parte Vere* (a) is a complete authority, that the creditors are entitled to retain the first payment, and to prove under the commission for the residue of the original debt.

The Order made was, that *Brown* should retain the 5s. in the pound already received by him, and that the proof made by him of the remaining 15s. in the pound on the amount of his debt should stand, and that the costs of the application, and those incidental thereto, should be paid out of the estate.

(a) 1 Rose, 281.



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Ex parte HAMILTON.—In the matter of HAMILTON.

IN this case, all the creditors but one of the bankrupt had signed a consent for the fiat being superseded, he having paid them the whole amount of their debts. The only remaining creditor, a person of the name of *Reinaker*, whose debt amounted to 50*l.*, had gone to Germany on account of ill-health, leaving a written authority with his brother to sign, *per procuration*, his consent for the issuing of the supersedeas; but the officer of the Court declined to issue the supersedeas upon the signature of the brother, unless he was duly authorized by a regular power of attorney. This formality was thought unnecessary by *Reinaker* and his brother, in consequence of which the bankrupt could not obtain his supersedeas.

Where the bankrupt is ready to pay all his creditors in full, and the only creditor whose consent is wanting to the supersedeas is abroad, the bankrupt may apply to pay the amount of that creditor's debt into Court, in order to prevent any delay in obtaining the supersedeas.

Mr. Montagu, on the part of the bankrupt, now applied for leave to pay the amount of *Reinaker's* debt into Court, whence it might be taken out by him, in case the proper power of attorney should not be lodged at the office; in order that the bankrupt might be no longer delayed in obtaining the supersedeas.

The COURT made the order accordingly; and directed that the Commissioner should certify the amount of the debts proved under the fiat, and that *Reinaker* should have the option of taking the money out of Court, or depositing the proper power of attorney at the Bankrupt Office.



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Where a creditor after the issuing of the *Fiat* assigns his debt, this does not give the assignee a right to prove it, but merely a right to call upon the assignor to prove the debt, as a trustee for the assignee.

Where a party, on the hearing of a petition, makes use of an affidavit to prove his case, the Court will not, because the affidavit does not go far enough for his purpose, adjourn the hearing of the petition to a future day, to enable him to examine the deponent *virâ voce*, unless the other party consents to such adjournment; for the deponent ought to have been in attendance, if it was likely that his personal examination would be necessary.

Ex parte THOMAS PARGETER DICKENSON.—In the matter of JAMES GIBSON.

THIS was the petition of a creditor for leave to prove five bills of exchange, the proof of which the Commissioners had rejected, under the following circumstances stated in the petition.

The commission issued on the 24th May 1831, when the bankrupt was indebted to one *John Aldridge*, as the holder of six bills of exchange, drawn by *E. W. Dickenson*, the brother of the petitioner, upon and accepted by the bankrupt. These bills amounted altogether to 1200*l.*, and were duly transferred to *Aldridge* before the issuing of the commission, though only one was then actually due. On the 6th December 1831, *Aldridge* sold these bills to one *J. Weston*, as a trustee for the petitioner, for the sum of 600*l.*, which purchase money was duly paid by the petitioner. Five of the bills, to the amount of 1000*l.*, were then duly delivered by *Weston* to the petitioner, but the remaining bill for 100*l.* had not been delivered. On the 5th June 1832, the petitioner tendered his proof on the five bills, which was rejected by the Commissioners, on the ground that there was a balance alleged to be due from *E. W. Dickenson* the drawer, to the estate of the bankrupt, and that the petitioner was the mere agent of *E. W. Dickenson* in the whole transaction. This was however denied by the petitioner, who asserted that he had no connection whatever with *E. W. Dickenson* in his dealings with the bankrupt, and that the bills were *bonâ fide* purchased on the petitioner's account. It was also stated, that *E. W. Dickenson* was a mortgagee of the bankrupt; and that when the

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Commissioners rejected the claim of the petitioner, on the ground that *E. W. Dickenson* was indebted to the bankrupt, both the assignees and the solicitor to the commission were in possession of a statement furnished by *E. W. Dickenson*, under an investigation directed by the Commissioners, by which it appeared that *E. W. Dickenson* was a creditor of the bankrupt; which statement, it was alleged, was not brought to the knowledge of the Commissioners. *Aldridge* and *Weston* had made affidavits in confirmation of the petitioner's statement, which were afterwards produced before the Commissioners at an adjourned meeting, when the petitioner was also examined by the Commissioners; but he asserted, that the questions and answers were not taken down in the customary manner, nor submitted for the petitioner's signature or inspection; and he further alleged, that the solicitor to the bankrupt's estate was a brother of the principal creditor, and that he had declared his intention to fight off every claim.

In answer to this statement of the petitioner, it was sworn by the assignees, that in March 1832, the petitioner applied to them to confer with him upon certain bill transactions, which existed between the bankrupt and *E. W. Dickenson*; when they told the petitioner, who they believed was acting for *E. W. Dickenson*, that if the petitioner would commit to writing what he had to say on the business, they would then hand it over to the proper parties. In consequence of this intimation, the petitioner made the following proposal in writing, namely, that the assignees, or the bankrupt, should pay or secure 15s. in the pound on the amount of the bankrupt's acceptances, on the whole being delivered up, and give *E. W. Dickenson*

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credit in account with the bankrupt for the difference of 5s. in the pound. On the 20th March the deponent received from *E. W. Dickenson* a letter, inviting the assignees to state the claims of set-off they intended to make against him, and asserting that the bankrupt's unsatisfied acceptances of his drafts was 3740*l*. To this letter the assignees returned an answer, that assignees were not bound to make out creditors' accounts, and that it was not in their power to compromise with creditors, as proposed by his brother the petitioner; and adding, that they should expect to see him at a meeting of the Commissioners on the 30th April, when he might explain and establish such claim as he might have against the bankrupt's estate. The assignees stated, that they believed the alleged claim of the petitioner to be founded on fraud, and that it was made in collusion with *E. W. Dickenson*, and *J. Aldridge*, (the latter of whom, it was alleged, had been lately convicted of a conspiracy to extort money by a false charge of forgery,) and one *J. Weston*, who had lately been made a bankrupt; and that the claim was made by the petitioner, in consequence of the inability of *E. W. Dickenson* to bring forward any legal claim, and was founded on a fictitious consideration stipulated to be paid by him, in the event of his succeeding in establishing a proof against the estate. And the assignees further swore that, upon the face of an account appearing in one of the bankrupt's books, a considerable balance was due from *E. W. Dickenson* to the bankrupt, in respect of numerous bill transactions between them, and also the sum of 137*l*. for corn and coals; in respect of which last sum the assignees had caused a bailable process to be issued against

W. Dickenson, but that he could not be met with to answer the same.

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An accountant employed by the assignees swore, that appeared by the bankrupt's books, that between the years 1828 and 1831, the bill transactions between the bankrupt and *E. W. Dickenson* amounted to 17,000*l.*, and that these were all accommodation transactions; and that it was evident, from the correspondence between the bankrupt and *E. W. Dickenson* and *J. Weston*, that *Weston* was intimately connected with these transactions, in co-operation with *E. W. Dickenson*. That, as far as he was able to ascertain from the bankrupt's books and papers, *E. W. Dickenson* was then indebted to the estate of the bankrupt in 759*l.* 11*s.* 5*d.*, and would be indebted 700*l.* more, if a dishonoured bill and note, on which he was liable as indorser and maker, were returned by the holder to the assignees.

It was sworn also by Mr. *Saxon*, the solicitor of the assignees, that the bill transactions between the bankrupt and *E. W. Dickenson* being of a very suspicious nature, and many dishonoured bills to a considerable amount being presented for proof against the bankrupt's estate, the Commissioners issued a summons for *E. W. Dickenson* to appear before them on the 12th July 1831, for the purpose of being examined touching these transactions; but that he did not attend such summons, nor assign any reason for his non-attendance. A fresh summons was then issued for the 9th November 1831, which could not be served upon him, in consequence of his keeping out of the way, and was by mistake served upon his brother, the petitioner; but the solicitor communicated the summons to him by a letter, the receipt of which he afterwards acknowledged. On the

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3d December 1831, the solicitor addressed another letter to him, urging the necessity of his appearance before the Commissioners; to which he replied, that whilst the assignees refused to state the information they wanted, and which he declared himself ready to give as to any of his transactions with the bankrupt, they had no right to treat him as a party withholding information. On the 9th March 1832, the petitioner called on the solicitor to obtain information respecting the state of the bankrupt's affairs, when the solicitor was given to understand that he was the accredited agent of *E. W. Dickenson*, in respect of his account with the bankrupt. On the 30th April following, *E. W. Dickenson* appeared before the Commissioners, when, the accountant to the estate observing that the account between him and the bankrupt was of so complicated a nature that it would require three or four days to investigate it, the Commissioners arranged that he should meet the accountant on the 2d May for the purpose of proceeding with the investigation. The solicitor was requested by the accountant to attend this meeting; but this being objected to by *E. W. Dickenson*, he waived the point, and a short conference took place between them, without the presence of any third person. After this meeting *E. W. Dickenson* wrote to the assignees, objecting that they had charged against him bills not in their possession, but still outstanding against him in third hands, and likewise one for 500*l.*, of which no notice of non-payment had been given. The assignees replied that they declined to deal with the matter piecemeal by an epistolary correspondence, and that they hoped he would see the propriety of going through the investigation with the accountant,

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according to the arrangement made by the Commissioners. The solicitor then stated, that as he had not succeeded in having this investigation carried into effect, and as it appeared by the bankrupt's books that *E. W. Dickenson* was indebted to the bankrupt's estate in 137*l.* for corn and coals, he, on the 28th May, caused a bailable writ to be sued out against him for this sum into the counties of Middlesex and Cheshire, but that he could not be met with in either of those counties, for the purpose of being arrested; and at the same time there was a writ out against him for 10,000*l.*, at the suit of *John Aldridge*. The solicitor also swore, that *John Aldridge*, to whom it was alleged in the petition that the bankrupt was indebted in 1200*l.* on the bills of exchange therein mentioned, had been lately convicted of a conspiracy to extort money by a false charge of forgery, and was also the keeper of a gaming house, No. 6, in St. James's Square, from which house *E. W. Dickenson* had dated many of his letters to the bankrupt; and that from the tenure of many such letters, as well as of others addressed by *J. Weston* to the bankrupt, there appeared to have existed an intimate connection and co-operation between *E. W. Dickenson* and *Weston*, in reference to the bill transactions between *E. W. Dickenson* and the bankrupt.

The solicitor then stated the substance of the petitioner's examination before the Commissioners on the 13th July 1832, which was as follows, namely,—that he had given to *J. Weston* his promissory notes for 510*l.* payable at a date when a dividend was likely to be made, as part of the consideration for the bills mentioned in the petition; that the petitioner's brother had nothing whatever to do with the proof, which the petitioner sought to

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make under the commission; that the purchase of the bills was subsequent to the bankruptcy; that one *J. Nowell* was the person on whom *Weston* drew the drafts that were paid to *Aldridge*, and that these were dated contemporaneously with the transaction; that the petitioner's notes never passed into *Aldridge*'s hands at all; that the petitioner agreed to indemnify *Weston*, who was also to have the further responsibility of the petitioner's brother; that as to the petitioner being the agent of his brother, his only object was to relieve his brother from pressure; that his brother would be his debtor to the amount of 510*l.*, if he did not recover that sum out of the bankrupt's estate; and that he did not know that he could sue his brother, though he should consider him his debtor for that sum.

The solicitor then swore, that with respect to the allegation in the petition, that the statement of account furnished by *E. W. Dickenson* was not brought to the knowledge of the Commissioners, when they rejected the proof of the petitioner,—that no such statement of account was ever furnished, to the best of his knowledge and belief; but that the ledger account of the bankrupt with *E. W. Dickenson* was produced when the petitioner applied to prove, and was repeatedly referred to, and was open to the inspection of the petitioner, who however took no notice of such account, though on the face of it there stood a large balance against *E. W. Dickenson*. The solicitor further stated, that when the petitioner called on him on the 9th March 1832, he said nothing about having become the purchaser of the bills; and previous to the time of such alleged purchase there had been four public meetings for proof of debts, but that neither *Aldridge* nor *Weston* had ever at-

tempted to prove any debt, or make any claim against the bankrupt's estate.

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It was sworn by *J. Davenport*, who had been a clerk of the bankrupt for the last six years before his bankruptcy, that in June 1828 the bankrupt and *E. W. Dickenson* began to exchange with each other accommodation paper, and that their dealings in such paper between June 1828 and May 1831 amounted to 17,000*l.* That the mode practised between them was this:—*E. W. Dickenson* drew on *J. Weston* and other persons, sometimes in favour of himself, and at other times in favour of the bankrupt, and transmitted the bills to the bankrupt, who accepted drafts drawn on him by *E. W. Dickenson*.

Mr. Montagu, and *Mr. Wightman*, appeared in support of the petition. The question is, whether *Aldridge*, who was the holder of these bills at the time of *Gibson's* bankruptcy, was entitled, or not, to prove them under the commission. We contend, that *E. W. Dickenson*, whose name appeared upon the bills, was not indebted to *Gibson* at his bankruptcy; but if he was, that makes no difference. [*Erskine*, C. J. I suppose they contend, on the other side, that the petitioner, in fact, represented the drawer of the bills.] The petitioner is in Court ready to be examined, *vivá voce*, as to all the particulars of the transaction. *Ex parte Lloyd* (a) is an authority to show, that any creditor, who has a debt provable under the commission of a bankrupt, is entitled to sell the debt, with the right to prove it. It must be assumed in this case, that *Aldridge* had at the time of the issuing of the commission a perfect right to

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prove these bills against the bankrupt's estate. [Sir *G. Rose*. If a party is not a creditor himself, at the time of the commission, *he* has no right to prove. How can the Commissioners entertain a proof, where the party was not a creditor when the commission issued? A debt may be sold after proof, with all its incidents as to dividends, &c.; but a creditor cannot, after a commission against the debtor, sell his right to prove.] *Aldridge* has sworn in his affidavit, that the bankrupt was indebted to him in 1000*l.* and upwards, being the amount of the five bills now sought to be proved by the petitioner, for a good and valuable consideration in money, and that he sold these bills to *Weston* for 600*l.* [Sir *G. Rose*. The assignment of a debt does not confer upon the assignee the right to prove it, but merely the right to call upon the assignor to prove the debt, in trust for the assignee.] When the proof was rejected by the Commissioners, it was not because *Aldridge* had given no consideration for the bills; but because *E. W. Dickenson* was indebted to the bankrupt, and there was no affidavit of any consideration paid to *Aldridge* for the transfer of them. We now propose, therefore, to examine the petitioner, *vis à voce*, as to that fact. [Sir *G. Rose*. The sole question really appears to be, whether *Aldridge* was a *bonâ fide* holder of these bills, at the time of the commission.]

Mr. *Twiss*, and Mr. *J. Russell*, for the assignees, objected to the examination of the petitioner, *vis à voce*; and contended, that *Aldridge* ought to go in the regular way before the Commissioners, and tender his own proof upon these bills.

The Court, however, overruled the objection.

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Thomas Pargeter Dickenson, the petitioner, was examined *vivâ voce*, and stated that on the 24th of 1831 *Aldridge* was the holder of the bills, and that he, the petitioner, was the holder now, having purchased them of *Weston* on the 6th December 1831, whom they had been previously transferred by *Aldridge*; that he paid *Weston* 210*l.*, and had engaged to pay him 300*l.* more; that he had never had any dealings himself with the bankrupt, and did not know whether the bankrupt was indebted to his brother *W. Dickenson*, or whether his brother was indebted to the bankrupt; that the petitioner was not the agent of *E. W. Dickenson*, and that he procured the bills for the purpose of protecting his brother from any proceedings on them; and that none of the bills were due at the time of the commission.

The petitioner's counsel then put in an affidavit of *Aldridge*, in which he swore that the bankrupt was indebted to him in 1100*l.* on the bills in question, and that he transferred them to *Weston* for 600*l.* Notwithstanding, however, the affidavit of *Aldridge* as explanatory as they wished, they then applied for leave to examine *Aldridge* *vivâ voce*; and as he was not then in attendance, that the further hearing of the case might be adjourned for that purpose.

Sir G. ROSE.—I conceive you have no right to make such an application. There is no allegation in this petition, that any proof was ever tendered by *Aldridge*. The only complaint to this Court is, that the Commissioners rejected the proof of the petitioner. When your case has proceeded to a certain extent, and you find it breaks down under you, you then tender an

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examination *vivâ voce*, which you have no right to do.

ERSKINE, C. J.—If *Aldridge* was a *bonâ fide* holder, it would be of no consequence how the account stood between *E. W. Dickenson*, the drawer, and the bankrupt. The Commissioners certainly appear to have misled you in some measure, as to a material part of your case; for the only point made before them was, whether the petitioner was the mere agent for his brother or not. The Court think, however, that the petition should not stand over for the purpose of examining *Aldridge vivâ voce*, unless the other side consent.

Sir J. CROSS.—I never look at a point of form, unless it is contended for by one of the litigant parties. If the petitioner thought, that the personal examination of *Aldridge* was necessary in order to establish his case, he ought to have had him here. But where a petitioner makes use of the affidavit of a party, and finding that does not go far enough, he then proposes that the deponent shall be examined *vivâ voce*,—I cannot lend myself to such a proceeding. The complaint to this Court is, that the Commissioners rejected the proof of the petitioner. As it seems to me, therefore, your case has broken down under you.

Mr. *Montagu* and Mr. *Wightman* then contended, that as the petitioner was stopped by the Commissioners *in limine*, he could not be required to tender any particular form of proof, when the Commissioners rejected his proof altogether, without objecting to

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the form of it, or adverting to any other form in which the debt might be proved. The petitioner conceiving himself aggrieved by the rejection of his claim, procured the affidavit of *Aldridge* in order to explain the transaction. The prayer of the petition is general, and does not ask for any particular form of proof. There is nothing inconsistent with the prayer, or with the rights of the petitioner, to have his debt proved in the name of *Aldridge*. We do not care how the proof is moulded, whether in one form, or another. The question in substance is, whether the debt is provable or not; and as no objection was made before the Commissioners, as to the want of any affidavit whatever of *Aldridge*, we were stopped in our progress, and had no opportunity of tendering another form of proof. We were therefore entitled to prove in some form or other. [Sir G. Rose. No Commissioner ought to have received such a proof, whether it was objected to, or not; and you have not satisfied my mind, that *Aldridge* himself had a right to prove the bills.] We admit that the affidavit of *Aldridge* was defective, if it was tendered to the Commissioners as sufficient for them to take the proof in his name. But the case never arrived at that point. They decided that the bills could not be proved by any one, before the state of the account between *E. W. Dickenson* and the bankrupt was ascertained. That was the objection made by the Commissioners, and that is now the only point before the Court. It would have been premature in us to have tendered to the Commissioners any other form of proof—it was only incumbent on us to remove previous objections. If the Court think, that the proof ought to

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be received on the merits, it is then for the Commissioners to see that the proper form is adopted.

Mr. *Twiss* and Mr. *J. Russell*, contra, were stopped by the Court.

FRSKINE, C. J.—The prayer of this petition is, merely, that the Commissioners may be ordered to receive the proof of the amount of the petitioner's debt, and the statement throughout the petition is, that the petitioner applied himself *to prove his debt*. Now, although the only objection raised to the proof before the Commissioners was, that the petitioner was the agent merely for his brother *E. W. Dickenson*, and that *E. W. Dickenson* was indebted to the bankrupt, instead of the bankrupt being indebted to him,—yet the natural answer of the petitioner to this objection would have been, that he was not such agent, but that he purchased the bills of *Aldridge* for a valuable consideration; and that *Aldridge* was a *boná fide* holder of the bills at the time of the bankruptcy, and had therefore a right to prove them in his name as a trustee for the petitioner. The affidavits do not show, however, that this last point was at all raised before the Commissioners; and on that ground, I think, if we dismiss this petition, it should not be dismissed with costs. But the petitioner ought to have shown before us to-day, that he had a right, in the name of *Aldridge*, to have his proof put upon the proceedings. Now is the affidavit of *Aldridge* satisfactory on this point? The affidavit states, in general terms, that the bankrupt ~~was~~ indebted to him on the bills of exchange therein mentioned. But when the very essence of the objection

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raised to the proof of this debt is a contrivance between the petitioner and *Aldridge* to prove certain bills, which it is alleged could not be proved by *E. W. Dickenson*, the affidavit should have stated the time when the bills were indorsed by him to *Aldridge*, as well as other matters, in order to show that *Aldridge* had a good and provable debt at the time of the issuing of the commission. But, for the reason before given, I think the petition should not be dismissed with costs. For the objection taken by the Commissioners, that the petitioner was the agent merely of the drawer of the bills, amounted in fact to nothing. The substantial ground of objection was, the connivance between the petitioner and *Aldridge* and the drawer of the bills; and this point was never raised before the Commissioners.

Sir J. Cross.—It is admitted, that the essential question which we have now to consider is, whether *Aldridge* was a *bonâ fide* holder of these bills at the date and issuing of the commission; and this important question, the very gist of the case, was never gone into before the Commissioners. But what is the evidence even now offered, that *Aldridge* was such *bonâ fide* holder? It is only stated in his affidavit, that he gave a good and valuable consideration for the bills. But *what* this consideration was, or *when* it was given by him, or *where* the transaction took place, is altogether studiously concealed. Nay, the petitioner himself, who is the brother of the drawer of the bills, and has been examined before us to-day, says, that he knows nothing of the dealings between his brother and *Aldridge*. As it does not appear, therefore, that *Aldridge* was a *bonâ*

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fide holder of the bills when the commission issued, I think we are bound to dismiss this petition.

Sir G. ROSE concurred.

Petition dismissed, but without costs.

Ex parte THOMAS RANDLESON.—In the matter of
THOMAS HOBSON.

1833.

Westminster,
January 22.

Where there was a running cash and bill account between the bankrupt and a banking company, who were under considerable advances to him, but part of these advances arose out of illegal transactions; and the bankrupt from time to time deposited bills, and made payments, without any specific appropriation, or any settled account between him and the bankers: Held, that the payments must be appropriated in reduction of the earlier items of the account, and of the legal, and not the illegal, part of the demand.

A banker's pass-book de-

livered to his customer, in which there are entries on one side only, is not evidence of a settled account between the parties, although the customer keeps the book, without making any objection to the entries contained in it.

THIS was the petition of an assignee, which came on by way of further directions, for expunging the proof of a debt. On the hearing of two former petitions in this matter before the Vice-Chancellor, on the 27th October 1828, it was ordered that so much of the proof of 11,722*l.* 12*s.* 4*d.* made by one *Archibald Scot*, as was founded upon the issuing or passing of the notes and bills of the Leith Banking Company by *A. Scot* to the bankrupt, should be expunged; and that it should be referred to the Commissioners to inquire into the validity of the debt, and how it was constituted.

Upon a petition of appeal from this order to the Lord Chancellor, which was heard on the 29th July 1830, before Lord *Lyndhurst*, it was ordered that so much of the Vice-Chancellor's order as related to the description of that portion of the proof to be expunged, should be reversed; and that the order as to expunging should be confined to "so much of the debt of the said *A. Scot*, if any, the consideration of which consisted of notes of the Leith Banking Company delivered at Carlisle by the said *A. Scot* as agent of that Bank."

On the 21st October 1831, the Commissioners made their certificate, since which *A. Scot* became bankrupt in Scotland, and *A. Law* became his representative in London and estate.

In February 1832, the petitioner presented another petition to the Lord Chancellor, on the matter of the Commissioners' certificate, which having been transferred to the Court of Review, came on to be heard on the 1st March 1832, when an order was made that the Commissioners should review their certificate, and that their directions and costs should be reserved, until after the Commissioners should have made their further certificate.

On the 6th July 1832, the Commissioners made their further certificate, in which they entered at great length into the constitution of the debt proved by *Scot* under the commission, and certified that the whole of the payments made to the bankrupt by *A. Scot*, was £359*l.* 2*s.* of which were in notes of the Leith Banking Company, and 4216*l.* 6*s.* 6*d.* in bills drawn by him on and accepted by the Company's agents in London) were made, whilst *Scot* was a partner in that bank, and amounted to 23,161*l.* 6*s.* 7*d.*; and that in making the proof, that amount was reduced by goods deposited, and by payments made to *A. Scot* on a general account, to the sum of 11,722*l.* 12*s.* 4*d.*, the amount of debt proved by *Scot* under the commission; but that the last sum had been further reduced to 10,324*l.* 9*s.* 6*d.*, the money subsequently received by *Scot*, on account of the same deposited with him by the bankrupt on the general account. The Commissioners further certified, that the bills and notes delivered, and the payments made by the bankrupt to *Scot*, in reduction of the advances made

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from time to time by *Scot*, were made without any specific appropriation being directed or made by either of the parties; and that notwithstanding it appeared from *Scot's* books, that on the 31st December 1825 there was a balance struck in favour of the bankrupt, yet that there was no evidence of knowledge or assent thereto by the bankrupt, or that *Scot* considered such balance as the settlement of an account, or as an appropriation of any kind. And that it appeared, that *Scot* had on the 30th December 1825 obtained from the bankrupt a warrant of attorney for 10,000*l.*, on which judgment was signed on the 3d January following; but that at the time the warrant of attorney was granted, there was no statement of account, or any balance struck, between the parties. The Commissioners further certified, that inasmuch as the whole account between *Scot* and the bankrupt appeared to have been one general running account, and as the amount of the notes of the *Leith* Banking Company delivered at Carlisle by *Scot*, as the agent of such bank, were illegal (*a*) transactions, and formed part of such general accounts; and inasmuch as none of the payments in such account were treated as specific appropriations, in liquidation of those notes; and as the amount of such notes exceeded the amount of the debt claimed to be due, and under such circumstances must be taken as forming the consideration for such debt,—

(*a*) The grounds on which the Commissioners determined that the issue of the notes by *A. Scot* to the bankrupt were illegal transactions, were, that the *Leith* Banking Company consisted of more than six partners; which partnerships were, at the period of the transactions referred to, prohibited by the 15 *Geo.* 2. c. 13. s. 5. That statute, however, is now repealed by the provisions of the new act relating to the privileges of the Bank of England, 3 & 4 *W.* 4, c. 98, s. 2, 3.

the Commissioners had expunged the whole of the proof of such debt.

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Mr. *Montagu* and Mr. *Wray* appeared in support of the petition. As no question was raised by the respondents, in the course of the inquiry before the Commissioners, as to the manner in which they took the account, and no exceptions have been since taken to the Commissioners' certificate, it is not open to the respondents now to impeach the certificate, by showing that the account has been improperly taken by the Commissioners. The issue of the notes of the *Leith Banking Company* to the bankrupt by *Scot*, who was one of the partners in the bank, was an illegal transaction, the bank consisting of more than six partners; for it is expressly provided by the 15 *Geo. 2. c. 13. s. 5.*, that it shall not be lawful for any persons whatsoever united in covenants or partnership, exceeding the number of six persons, to borrow, owe, or take up any sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof. [Sir *G. Rose*. May not a bond given in exchange for a voluntary bond be considered as a legal debt, although the voluntary bond could not itself be proved?] That depends on a particular statute, which says that voluntary bonds shall be void only as against creditors. But, in general, a substituted security is just as illegal as the original security, if that was illegal. The question is here, whether there has been a specific appropriation of any of the payments made by the bankrupt to *Scot*, in liquidation of the debt created by the issue of the notes of the *Leith Banking Company*. Now the Commissioners have expressly

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found, that there was no such appropriation. And the law is clear, that where a debt is composed partly of legal, and partly of illegal, transactions, and a payment is made by the debtor, generally,—the payment must be taken in reduction of the legal part of the demand, and cannot be applied to the illegal part of the account; *Wright v. Laing* (a), *Birch v. Tebbutt* (b). If there had been a settled account, and a balance struck previous to the payments made by the bankrupt to *Scot*, the case would have been different. But the Commissioners have certified, that on the 30th December 1825 there had been no statement of account, or any balance whatever struck between these parties.

Mr. *Whitmarsh*, and Mr. *Miller*, for the respondents. The Commissioners do not state the grounds, on which they certify that there has been no appropriation. We tendered evidence before them to show, that there was an appropriation, and proposed to prove this from various entries in the pass-book, which was made up from the cash account. [Sir *G. Rose*. The question is, whether any statement in the pass-book amounts to a settled account, or whether it is not merely, what the Commissioners treat it, a running account.] Every item of the account, as entered in the pass-book, amounts to an appropriation by the parties themselves. [Sir *G. Rose*. Supposing a bill, which is entered in the pass-book at the end of 1825, is dishonoured in 1826, would not this open the account in 1825?] The sole purpose for raising this question of appropriation was for withdrawing a certain portion of the debt from the proof made by *Scot*

(a) 3 B. & C. 165.

(b) 2 Star. Rep. 74.

under the commission. Now in the certificate of the Commissioners, there is no statement which is applicable to the debt, in respect of which the proof has been made. Nor have the Commissioners come to a right conclusion on the facts which they have stated.

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Mr. *Montagu*, in reply, was stopped by the Court.

ERSKINE, C. J.—It has been contended on the part of *Scot*, that there is nothing contained in the certificate of the Commissioners, which can cut down the proof he has made under this commission. Now it appears from the statement in the original petition presented by *Scot* to the Lord Chancellor, that part of the claim made by him before the Commissioners was for advances to the bankrupt by the issue of notes and bills of the *Leith* bank, in which house *Scot* was a partner, and which consisted of more than six partners. That portion of the claim, therefore, which consisted of the notes and bills so issued, constituted an illegal debt. And the Commissioners certify, that inasmuch as the whole account between *Scot* and the bankrupt appeared to have been one general running account, and as the amount of the notes of the *Leith* Banking Company delivered at Carlisle by *Scot* were illegal transactions, and formed part of such general account, and inasmuch as none of the payments in such account were treated as specific appropriations in liquidation of those notes, and as the amount of such notes exceeded the amount of the debt claimed to be due, and under such circumstances must be taken as forming the consideration for such debt,—the Commissioners had expunged the whole of the proof of such debt. If there had been any

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evidence of a settled account between these parties, the Court would have willingly received it,—such as an entry of the *Leith* bank notes on one side of the account, and an entry of payments made by the bankrupt on the other: which would have amounted, perhaps, to an appropriation of such payments, in discharge of the debt created by the issue of such notes. Then it is said, that from the entries in the pass-book in 1825 of bills deposited by the bankrupt with *Scot*, it must be taken that there was a settled account between them. But as these entries were on one side only, it seems to me impossible to consider this in the light of a settled account; and more especially as there was a warrant of attorney then given by the bankrupt to *Scot*, to secure the payment of bills outstanding. It appears to have been nothing but the statement of an account of bills deposited with *Scot*, for the amount of which the customer might draw upon the bank. There being therefore in this case no specific appropriation by *Scot* of any bills deposited, or of payments made, by the bankrupt, in reduction of any particular portion of the debt, the Court will appropriate the early payments to the early items of the account, and to the legal, and not the illegal, part of the demand. Under these circumstances, I think the Commissioners have done right in expunging the debt.

Sir J. Cross.—Between these parties now before the Court, the Vice-Chancellor has already decided, that there shall be no proof, the consideration for which was founded upon the issuing or passing of the notes and bills of the *Leith* Banking Company by *Scot* to the bankrupt. The Lord Chancellor confirmed that decision. The

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Commissioners have expunged the whole of the proof on such notes and bills, as they were directed to do. And now further inquiry is prayed by *Scot*, on the ground of rejection of the evidence of the pass-book; and the Court has consented to deal with the case in the same manner, as if that evidence had been received. Now, with regard to the pass-book, it may be observed, that bankers make up these books every year, in order to satisfy their customers of the state of their accounts with them. The only inference, therefore, that can be drawn of any entry in the pass-book is, that the customer, by keeping the book, admits the statement in it to be correct. Then it is objected, that the Commissioners have not applied the statement in their report to the proof upon the file. But it appears from their certificate, that in 1825 *Scot* issued to the bankrupt 8,000*l.* of these *Leith* bank notes, which formed part of the account in respect of which the proof was made. I concur, therefore, in thinking that there is no ground for further inquiry, or for impeaching the correctness of the Commissioners' certificate.

Sir G. ROSE concurred.



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Ex-parte EDWARD ROTHWELL.

Westminster,
January 23.

Where a testator bequeaths the *whole* of his property to trustees, for the payment of an annuity, and other purposes, and the trustees become bankrupt, the trust fund must be set apart for the payment of the whole annuity, without regard to the interests of the persons entitled to the residue.

THE petitioner in this case was entitled to an annuity of 50% under a will. The testatrix bequeathed all her estates and effects to certain trustees, upon trust to pay the annuity to the petitioner for his life, and after his decease to divide the same among his children. The trustees had become bankrupt, and the fund set apart for the payment of the annuity had become so reduced in amount, as to be scarcely sufficient to pay it. The petitioner therefore prayed, that the amount of the trust fund, or so much thereof as was sufficient to pay the annuity, should be paid into the hands of the Accountant-General, and that the annuity should, in the first place, be paid out of such fund to the petitioner, without any abatement.

Mr. *Wheatley* in support of the petition. The testatrix having limited the *whole* of her property to the trustees for the payment of the annuity, the whole of the annuity must be paid to the petitioner, without any regard to the interest of the persons entitled to the residue; *Davies v. Wattier* (a), *May v. Bennett* (b).

The COURT observed, that some counsel should appear for the children, but made the order as prayed, conditionally.

(a) 1 Sim. & Stu. 463.

(b) 1 Russ. 370.



Ex parte HENRY DART.—In the matter of **THOMAS SANDYS.**

1833.

*Westminster,
January 23.*

THIS was the petition of a creditor to supersede the fiat, which had been issued under the following circumstances, as stated in the petition.

In the beginning of the year 1827, and down to the time of the issuing of the fiat, the bankrupt *Sandys* carried on the business of an attorney and solicitor, at Corsham, in Wiltshire, where he constantly resided during the whole of that time, and also for some time previous to May 1832 filled the office of clerk to the magistrates at Corsham. *Sandys* having become indebted to the petitioner in the sum of 30*l.*, as the acceptor of a bill of exchange, which was dishonoured, the petitioner, in Michaelmas term 1831, commenced an action against him in the Court of King's Bench, which *Sandys* proposed to petitioner to discontinue, upon his giving the petitioner a warrant of attorney for the sum of 100*l.*, and costs of suit, with a defeazance thereon to pay the sum of 49*l.* 19*s.* 8*d.*, being the amount of the debt and costs, with interest thereon until payment, by two instalments, viz. the sum of 16*l.* 18*s.* 8*d.* on the 2d June last, and the remainder, 33*l.* 1*s.* on the 2d July following. The petitioner having acceded to this proposal, the warrant of attorney was accordingly prepared by his solicitor, and was, at the request of *Sandys*, sent to the office of his agent, *W. H. Garry*, of South Square, Gray's Inn, where *Sandys* executed the warrant of attorney on the 2d May 1832. In this warrant of attorney *Sandys* was described as "of *Corsham*, in the county of *Wilts*," where he was in fact at that time residing, and carrying on his profession of an attorney and solicitor. On the 27th July

A country attorney hires a room in *Bell Court, Brooks' Market, London*, which he keeps four weeks, and in which he puts 82 old volumes of books, sticking up a paper in the window, in which his name was written, with the addition of "*bookseller*." A fiat, having been issued against him by this description, was annulled, on the ground of fraud.

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1832, a fiat was awarded and issued against him, upon the petition of *Garry*, in which he was described as “of Bell Court, Brooks’ Market, Bookseller,” and under which he was declared a bankrupt. *Garry*, and another creditor, were the only persons who proved any debts under the fiat; and *Garry* was chosen sole assignee, acting throughout as the solicitor to the fiat. The petitioner saw the announcement of the bankruptcy in the public papers, but never suspected that the *Thomas Sandys* described in the fiat, was the *Thomas Sandys* who was indebted to him.

It was sworn that *Sandys* never resided in *Bell Court, Brooks’ Market*, but that, a short time previous to the issuing of the fiat, he hired a shop and room there at 7s. a week, which he only occupied four weeks, namely, from the 11th to the 28th June. There being no counter in the shop, *Sandys* said he would borrow of *Garry* a table, which would do just as well, and which, with the exception of a stool, was all the furniture he put into the shop. The only books he brought in to stock it were 82 volumes, consisting principally of law books, a few old novels, and five volumes of a weekly publication called the *Mirror*. The landlord stated his firm belief, that during the month which *Sandys* occupied the shop, he did not sell a single book; for that a man who was in the employ of *Garry*, the petitioning creditor, usually came in the morning between 9 and 10 o’clock, merely to open the shutters; after doing which he locked the door and went away, and the shop generally remained locked up until evening, when the same man came and put the shutters up again. *Sandys* was not seen on the premises more than two or three times, nor did he, or any other person, ever sleep in either of the rooms during the

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DART.

whole four weeks; and instead of having his name painted on the outside of the shop, as is the practice among tradesmen, it was merely written on a small piece of paper, with the word "bookseller," and stuck up in the window.

Mr. *Swanston* appeared in support of the petition, and stated the affidavits confirmatory of these facts.

Mr. *Dixon*, *contrà*, relied on an affidavit of the bankrupt, in which it was sworn, that he actually did carry on the trade of a bookseller in *Bell Court*, and bought and sold books during the time he occupied the premises there. The petitioning creditor, *Garry*, appeared in person to oppose the petition.

ERSKINE, C. J.—This was not dealing with the fiat by the petitioning creditor, as fiats ought to be dealt with. It is evident, that the object in this case was, to give a description to the bankrupt, which might deceive his creditors. Such conduct has always been held fraudulent, both in the bankrupt and in the petitioning creditor; and therefore this fiat must be annulled.

Sir J. CROSS.—The trading, if it can be called a trading, that took place in *Bell Court*, *Brooks' Market*, was not a trading by the bankrupt for the purpose of earning his livelihood, but for the sole purpose of making him a bankrupt.

Sir G. ROSE concurred.

ORDERED, that the fiat should be annulled at the costs of the petitioning creditor, including the costs of this petition.

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Westminster,
January 23.

Ex parte GEORGE GINGELL.—In the matter of
GEORGE GINGELL.

A fiat was sued out on the 7th June by an attorney against his debtor, for the amount of his bill of costs, and the bankrupt was shortly afterwards discharged under the Insolvent Act, having inserted the amount of the attorney's bill in his schedule. The bankrupt passes his last examination; and on the 4th December petitions for an order to tax the attorney's bill, with a view of superseding the fiat, on the ground of the insufficiency of the petitioning creditor's debt.

Held, that the bankrupt could not, after lying by so long, and after his previous admission of the debt, apply for such an order.

Dissent. Sir J. Cross.

THIS was a petition of the bankrupt to tax an attorney's bill, the amount of which formed part of the petitioning creditor's debt, with a view to show that the debt was insufficient to support the fiat.

The bankrupt, having been arrested for debt in May 1832, took the benefit of the insolvent act, and was discharged from his imprisonment on the 13th July following. In the meantime, however, a fiat was issued against him on the 7th June, on the joint petition of *T. Clutterbuck*, an attorney, and *Luke Arnold*, a spirit merchant; under which he was declared a bankrupt. It appeared, that *Clutterbuck* had formerly been the attorney of the bankrupt, having been employed by him to prosecute an action for defamation, upon which he claimed to be a creditor of the bankrupt, in respect of his fees and disbursements, to the amount of 104*l.*; and that *Arnold* was a creditor for 63*l.* 7*s.* 3*d.*; which two sums exceeded the amount required by the act of parliament, in cases where there are two petitioning creditors. The bankrupt, however, disputed the amount of *Clutterbuck's* debt, alleging that the same was subject to a set-off of 10*l.* 16*s.* 4*d.* for goods sold and delivered to him by the bankrupt; that *Clutterbuck* had charged for some disbursements which were in fact made by the bankrupt, and for others which he had never made; and that although he had his bill taxed previous to the issuing of the fiat, yet that such taxation was *ex parte*, and took place while the bankrupt was in prison; and that if the bill had been properly taxed, and credit given for the 10*l.* 16*s.* 4*d.*, the

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Ginnell.

whole demand of *Clutterbuck*, together with the debt of *Arnold*, would not amount to the sum requisite to support the fiat. *Clutterbuck* was appointed assignee under the fiat, and the bankrupt passed his last examination, but delivered in a formal protest to the Commissioners against any proceedings under the bankruptcy, on the ground of the insufficiency of the petitioning creditor's debt; which was entered on the proceedings.

It was sworn by *Clutterbuck*, in answer to these allegations, that the bankrupt, in his petition to be discharged under the insolvent act, entered the whole of the sum claimed by *Clutterbuck* in his schedule, as one of the debts for which he was liable, without making any mention of the sum claimed by way of set-off; that he made no objection to the amount of the bill when it was delivered; and that although some of the fees to counsel were not paid, yet that *Clutterbuck* considered himself liable for them.

The bankrupt accounted for his omission to insert in his schedule the amount of what he claimed as a set-off, by stating that it was in respect of some wine which he had furnished to *Clutterbuck*, which had not been entered in his books, from which the items in his schedule were extracted.

Mr. *Swanston*, and Mr. *Bacon*, in support of the petition. The debts of the two petitioning creditors amount to 153*l*. If we can, therefore, satisfy the Court, that more than 10*l*. ought to be deducted from *Clutterbuck's* debt, the amount of the two debts will then be less than 150*l*., which is the sum required to support this fiat. [Sir G. *Rose*. The question is, whether, in

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this stage of the proceedings, a petition for a supersedeas will lie. The bankrupt goes on, without interfering in any way until after the last examination; and after acquiescing so long, the doubt is, whether we can now interfere in his favour.] The bankrupt did all that he could, by protesting against the validity of the commission and the sufficiency of the debt.

Mr. *Montagu*, for the petitioning creditor *Clutterbuck*. According to the old practice, as well as the new practice, where there is any doubt as to the real amount of the petitioning creditor's debt, the bankrupt must bring his action against the petitioning creditor, instead of petitioning to supersede the commission. In a recent case before this Court, where the bankrupt petitioned to supersede on the ground of the insufficiency of the debt, the Court said, they would not order him to pay costs, because he had applied without delay; but still they would not supersede. But, in this case, the bankrupt goes on submitting to the fiat, and takes no step to impeach it until the 4th December, long after his last examination. There is no doubt, that if he had not thought all along that he could do better by submitting to the fiat, than by resisting it, he would not so long have acquiesced in it. He finds now, however, that he cannot obtain his certificate, and that induces him to make the present attempt to upset all the proceedings which have taken place under the fiat.

Mr. *J. Russell* appeared for the other petitioning creditor *Arnold*, whose debt was not disputed; and urged similar arguments in opposition to the petition, and contended that the bankrupt was bound, by

having inserted the amount of *Clutterbuck's* debt in his schedule.

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Mr. *Swanston* in reply. The proceedings which took place in the Insolvent Court are not sufficient to prevent this Court from annulling the fiat, if it has not the legal requisites to support it. But the insertion of *Clutterbuck's* debt in the schedule was subsequent to the issuing of the fiat. And it cannot be said that the bankrupt acquiesced in the fiat, when he appeared before the Commissioners and protested against its validity.

ERSKINE, C. J.—The ground on which the petitioner prays a supersedeas in this case is, that the petitioning creditor's debt was not sufficient in amount to support the fiat; for that various charges ought to be deducted from the bill of costs of *Clutterbuck*, the petitioning creditor, and therefore praying that the bill might be referred to be taxed. In ordinary cases, there is no doubt that this is a matter of course, where an attorney is the petitioning creditor, and the correctness of his charges are disputed by the bankrupt. But the Court would not make any order for the taxation of this bill, if we thought that the fiat ought not to be superseded; because such an order would appear to be merely a preliminary step to the issuing of a supersedeas. Now what are the facts of this case? The bankrupt in his schedule made out to obtain his discharge under the Insolvent Act admits, deliberately, that the debt he owes *Clutterbuck* amounts to 104*l*. He had many opportunities of looking at the bill, which had been some time previously delivered to him; and

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Gibson.*

he, upon due consideration, inserts the word "admitted" in his schedule. If the bankrupt indeed had been able to show that he was a solvent person,—or if, even admitting his insolvency, he had come promptly to the Court after the issuing of the fiat, and showed good grounds for the taxation of the bill, notwithstanding the admission in his schedule,—we might then possibly have referred the bill to the proper officer to be taxed. But here, though the fiat was issued on the 7th June, and the adjudication only a few days afterwards, the bankrupt thinks proper to lie by, until he has gone through his examination; and then, after the petitioning creditor has incurred considerable expense in working the fiat, the bankrupt, on the 4th December, and not before, presents his petition for a supersedeas. It is said, however, that he protested against the validity of the fiat before the Commissioners. But he nevertheless permits the proceedings under the fiat to go on from June to September, without taking any proper steps to supersede it. Looking therefore at all these circumstances, and finding from his schedule delivered into the Insolvent Court, that he admits his debts to amount to 500*l.*, and that he has no more property than 19*l.* to discharge them with, I think that this petition ought to be dismissed.

Sir J. Cross.—This petition, it appears, was ripe for hearing on the 15th December last, and stood over for the accommodation of *Clutterbuck*; and now he objects to the prayer of the bankrupt's petition being granted, on the ground of laches. The bankrupt was in gaol,—he petitioned for his discharge,—but before he gets out of prison, *Clutterbuck* sues out the fiat,—he then goes

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to the Insolvent Court, when the bankrupt is brought up to be discharged, in order to inspect the schedule,—he sees the amount of his bill inserted in it, and taking advantage of that admission, he thinks he can rest upon it for the purpose of working this fiat. Such conduct appears to me, I must say, not far removed from knavery. But let us see how *Clutterbuck* works the commission. He was the petitioning creditor, as well as solicitor to the commission, and chooses himself to be sole assignee. When the bankrupt first appeared before the Commissioners, he verbally protested against the validity of the fiat. At the next meeting, on the 14th August, his protest was reduced into writing. Has not a bankrupt a reasonable time to get friends to assist him to come here, when he disputes the validity of a fiat that has been improperly issued against him? But have we not a discretion to exercise on this occasion? And ought we to tell a bankrupt, who comes to us for relief under such circumstances, “go elsewhere—go to law, and seek redress, if you can, with your empty pockets?” It is said, that the bankrupt, by entering in his schedule the amount of the debt claimed by *Clutterbuck*, admitted its validity. But, on the other hand, we have the admission, that the bill had not then been properly taxed. The schedule was true for its then purpose. The bankrupt might not know that he had a right to tax the bill—he might be afraid to tax it—at all events, he has deferred the taxation. In my humble judgment, the bankrupt has been guilty of no laches, that ought to deprive him of the relief he seeks before us this day. It appears, moreover, that the bankrupt has undergone a double ordeal. He was obliged to submit to the

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examination of any opposing creditor, before he could obtain his discharge under the Insolvent Debtors' Act; and he has passed his last examination under this fiat of bankruptcy, we are to presume, satisfactorily, as no observation has been made on that subject. With respect to any advantage arising to the bankrupt's creditors from these proceedings, has any fruit been produced by the fiat, which has been sued out by this three-fold minister of justice? What possible object could he have in issuing the fiat, except to make a job of it, or to help himself, if he could, by lying by until the bankrupt might obtain some property, and then seizing it in his character of assignee? Under all these circumstances, I think that the bankrupt has ample grounds for applying to supersede this fiat. And as *Clutterbuck* did not appear before us to oppose this petition, when it was ripe for hearing in December, I think he has no right now to avail himself of any objection to it, on the ground of the laches of the bankrupt.


Sir G. ROSE.—I think that this petition ought to be dismissed with costs. When it is said, that the Court ought to exercise its own discretion on an occasion of this kind, and not refer the petitioner to another tribunal for redress, I apprehend, the term discretion ought to be applied in this sense. If a bankrupt, after a fiat issues against him, suffers the proceedings to go on from June to December, without taking any steps to apply for a supersedeas,—and then, when the fiat has been working for six months, and he finds perhaps a difficulty in obtaining his certificate, he comes here for the first time with a petition to supersede, I admit that the Court has a right to exercise its discretion;

and the only discreet course for us to pursue, as it appears to me, is to dismiss a petition presented to us under such circumstances. But the simple question, which the bankrupt has raised before us on this petition, is debt, or no debt. Now suppose the bankrupt had tried this question by bringing an action in a Court of Law, would not his own admission of the debt contained in the schedule filed by him in the Insolvent Court, be given in evidence against him at the trial; and would not any common law judge, I would ask, direct a nonsuit upon such evidence? Motives, also, are never to be lost sight of by this Court, where a bankrupt, after so much delay, petitions for a supersedeas; and, in this case, there is no great stretch of improbability in the presumption, that the bankrupt thought it would be more politic not to dispute the debt of *Clutterbuck*, before he obtained his discharge under the Insolvent Act, for fear of raising an opposition to such discharge,—and that he has now, for a similar reason, lain by six months after the issuing of this fiat, namely, with the hope of getting his certificate; which, when he finds he cannot so easily obtain, he then discovers that the petitioning creditor's debt is insufficient to support the fiat. I confess, I think that the solicitor, who is the petitioning creditor in this case, has acted with perfect propriety in suing out a fiat against a man, who, though now insolvent altogether, may possibly soon acquire property, which ought to be divided among his creditors.

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ORDERED, that the petition should be
dismissed, but without costs.



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Westminster,
January 25.

In the matter of GRAHAM and TATE.

Where a creditor sent up the proper documents to prove his debt at a dividend meeting, and his solicitor forgot the day; another meeting was appointed at his expense to enable him to prove his debt, the payment of the dividend being ordered to be stayed in the meantime, and to be calculated afresh, in case he substantiated his proof.

THIS was the petition of a creditor, praying that an order of dividend might be rescinded; that another meeting might be called, at the expense of the petitioner, to enable him to prove his debt; and that the Commissioner might be directed, after such proof, to make a fresh calculation of the dividend. It appeared, that the petitioner, who was a creditor to the amount of 1,600*l.*, and lived at some distance in the country, sent up an affidavit of his debt and other documents to a solicitor in town, with instructions to exhibit them before the Commissioner at the dividend meeting, for the purpose of proving the debt. The meeting was appointed for the 20th of last month, but the solicitor forgot the day, and did not discover the mistake until the 15th of this month. The dividend declared was 2*s.* 6*d.* in the pound.

Mr. *Twiss*, in support of the petition, cited the case of *Ex parte Day* (a), where a similar application was granted by the Vice-Chancellor, and confirmed on appeal by the present Lord Chancellor; although two of the creditors in that case had actually received the dividend, and the application was opposed by one of those creditors, and the assignees.

The COURT thought it was a matter of some difficulty to rescind a dividend, which had been duly declared by the Commissioner; but, after some con-

(a) 1 Mont. 212.

sideration, made the following order, (subject, however, to the petitioner obtaining the consent of the assignees,) namely, that the payment of the dividend already declared should for the present be stayed; that another meeting should be called at the costs and charges of the petitioner, when he might go before the Commissioner and make such proof as he was able; and in case of any such proof being admitted, then, that the Commissioner should re-calculate the dividend afresh; but if no such proof was admitted, then the former dividend was to stand (a).

(a) S. P. *Ex parte Colton, re Hirst*, 12th June 1833.

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In re
GRAHAM
and another.

Ex parte WYNN ELLIS and others.—In the matter of JAMES HOUGHTON and JOHN WATTS.

Westminster,
January 25,
and Feb. 14.

THIS was a petition of assignees to expunge a proof, which had been admitted under the following circumstances.

E. Davies had, some time before the bankruptcy, accepted bills of exchange drawn by the bankrupts for their accommodation, to the amount of 1656*l.* 16*s.*; the bankrupts having promised to give *Davies* their acceptance in return. None of these bills, however, so accepted by *Davies*, were paid by him when due, and the whole were proved against the estate of the bankrupts. On the 4th January 1832, *Houghton* absconded with a large sum of the partnership monies; and on the following day *Davies* called upon *Watts*, and stated, that in consequence of *Houghton's* absconding he (*Davies*) should be ruined, as he could not pay his accommoda-

One of two partners, on the 4th January, commits a secret act of bankruptcy. On the 5th January, the other partner accepts three bills in the name of the partnership firm, in favour of one of the creditors of the partnership; all of which bills were ante-dated before the 4th January. These bills were afterwards indorsed for a valuable consideration to R., who had no notice of the act of bankruptcy. On the 10th January, a joint

commission issues against both partners; *Held*, that the holder of the bills could not prove them against the joint estate; as the solvent partner could not bind the joint property by accepting bills after the act of bankruptcy of his copartner.

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tion acceptances, and therefore requested *Watts* to give him either money or acceptances, in order that he might be held harmless. On the same day *Watts* accepted, in the partnership firm of "*Houghton and Watts*," three bills of exchange drawn by *Davies* payable to his own order, amounting together to 1550*l.*, two of which bills purported to be drawn on the 31st December 1831, and the other on the 2d January 1832,—but which were not in fact drawn on either of those days, but on the 5th January 1832, after *Houghton* had committed an act of bankruptcy by absconding. On the same day, namely, the 5th January, *Davies*, being largely indebted to one *W. Robinson* of Todmordin in Lancashire, for whom he was in the habit of selling goods on commission, indorsed the bills to him specially, and remitted them by the following letter, which was also falsely dated on the 2d January

"SIR,

London, 2d January 1832.

Enclosed you have bills value 1550*l.* to my credit, and towards which I shall feel obliged by your letting me have 1000*l.* as soon as possible, as I wish to open a handsome banking account. Your immediate attention will oblige.

Yours, &c.

Mr. William Robinson.

Evan Davies."

It did not appear, that the sum of 1000*l.* mentioned in this letter, or any money or goods, were advanced or sent by *Robinson* to *Davies* on account of these bills. And the petitioners alleged, that the letter was antedated on the 2d January, in order that it might appear that the remittance was made, as well as the bills accepted, before the act of bankruptcy committed by *Houghton*. But *Robinson* had, in fact, no notice, either of the act of bankruptcy committed by *Houghton*, or of the mode by which the bills had been procured by *Davies*. On the 10th

January 1832, a commission of bankrupt issued against *Houghton* and *Watts*, under which the Commissioner (*Fane*) permitted *Robinson* to prove the amount of the bills, on the ground that he was an innocent holder of them, and was not affected by the knowledge or conduct of *Davies*.

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Mr. *Swanston*, and Mr. *Montagu*, for the petition. As between *Davies* and *Watts*, there is no doubt that this was a fraudulent transaction; for *Davies* knew of *Houghton's* absconding, and then persuaded *Watts* to give him these three ante-dated bills of exchange. There was also sufficient to put *Robinson* on his guard, as to the fraud of *Davies*; for his letter inclosing the bills, which was sent to *Robinson* on the 5th January, was ante-dated on the 2d; and he was bound therefore to make some inquiry into the transaction. But *Davies* was also the agent of *Robinson*, in selling goods for him, and remitting him the proceeds; *Robinson* would therefore be bound by the acts of *Davies*, as his agent, and by the notice which the latter had of the previous act of bankruptcy committed by *Houghton*. [Sir *J. Cross*. Must not you show, that *in obtaining these identical bills* he acted as his agent?] The subsequent recognition by *Robinson* of the transaction, coupled with the anterior authority of *Davies*, involves *Robinson* in the acts of *Davies*. But, independently of this view of the question, it would seem, from the terms of the letter which inclosed the bills, that *Davies* remitted them to *Robinson* conditionally. Whatever right, therefore, *Robinson* can have to the bills, depends upon his performance of the condition contained in that letter, namely, by his advancing *Davies* 1000*l*. If *Robinson*

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had not the beneficial interest in the bills, a Court of Equity would not permit him to avail himself of his legal interest, under the special indorsement from *Davies*.

Sir G. ROSE.—The question is, whether these bills of exchange, being accepted by one partner after the other has committed an act of bankruptcy, and consequently after the severance of the joint tenancy, can bind the joint fund.

ERSKINE, C. J.—The first and material question is, certainly, as to the contract. If *Houghton* committed an act of bankruptcy on the 4th January, then there can be no subsequent joint contract.

Sir J. CROSS.—The case of *Lacy v. Woolcott* (a) seems, nevertheless, to be in favour of *Robinson's* claim on these bills; as well as the case of *Smith v. Oriel* (b).

As the objection regarding the validity of the contract was not raised before the Commissioner, the further hearing of the petition was directed to stand over for the convenience of the respondent's counsel, with liberty for him to file an affidavit as to the act of bankruptcy.

February 14.

Mr. *Swanston*, and Mr. *Montagu*, resumed their argument on this day, for the petitioner. It was decided by Lord *Kenyon*, in *Abel v. Sutton*, (c) that if a bill

(a) 2 D. & R. 458.

(b) 1 East, 368. And see *Fox v. Hanbury*, Cowp. 445; *Harvey v. Crickett*, 5 M. & S. 356. But see *Ramsbottom v. Lewis*, 1 Camp. 228, which is afterwards cited by the Chief Justice, and which is certainly the strongest authority against the right of proof in this case; and see 1 Dec. B. L. 631, and seq.

(c) 3 Esp. 108.

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is sent into circulation by one partner, after the dissolution of the partnership, all the partners must join in the indorsement; and that one partner, by putting the partnership name to the bill, cannot bind the rest. The same doctrine was held in *Kilgour v. Finlyson*. (a) This question is wholly distinct from that relating to the dominion which a solvent partner may have over the goods of the partnership,—or how far a retiring partner may, from want of notice of the dissolution, be liable afterwards for the debts contracted by the continuing partner. But supposing that one partner could generally, after a dissolution, make the other partner liable on a bill of exchange,—yet such liability could not exist under a commission of bankruptcy, so as to enable the bill-holder to charge the joint estate; for at the time of the concoction of the bill, the estate could not be the joint estate of the two partners, but the joint estate of one of the partners and the assignees of the other; *Bristow v. Potts* (b), *Barker v. Goodwin* (c), *Dutton v. Morrison* (d), *Re Wait* (e). There is only one case, which can be relied on by the other side, and that is *Lacy v. Woolcott* (f), referred to by Sir J. Cross. But there the outgoing partner had permitted his name to be used, and he had therefore no right to complain, or resist the claim of an innocent indorsee.

Mr. G. Richards, for the respondent. The objection to the proof, now mainly rested on by the other side, was never taken before the Commissioner. The only objections then taken were, that *Davies*, when he ob-

(a) 1 H. B. 155.

(d) 17 Ves. 195; 1 Rose, 213.

(b) 11 Ves. 88.

(e) 1 Jac. & W. 610.

(c) 11 Ves. 78.

(f) 2 D. & R. 458.

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tained these bills from *Watts*, had notice of *Houghton* having committed an act of bankruptcy; that the transaction amounted to a fraudulent preference; that *Davies* therefore could not have proved; and that as he was *Robinson's* agent, notice to him was notice to *Robinson*, and consequently *Robinson* himself could not prove. All these objections were overruled by the Commissioner. With respect to the objection that is now relied upon, it may be answered, that a dissolution of partnership, if secret, does not terminate the joint liability to a *bonâ fide* creditor, who is ignorant of the dissolution. Therefore, where one of the partners after such dissolution draws or accepts bills in the partnership firm, in favour of a creditor who has no notice that the partnership is dissolved, the other partners are liable on the bills; *Osborne v. Harper* (a), *Williams v. Keats* (b). So a retiring partner, who has done nothing to notify to the world that he has ceased to be a partner, is responsible to persons, who trust the continuing partner with goods on the credit of the partnership; *Goode v. Harrison* (c). Now, at the time *Robinson* received these bills, *Houghton* and *Watts* appeared to all the world as partners; and though *Houghton* had a few days previously committed an act of bankruptcy, yet this was perfectly unknown to *Robinson*; and a dissolution of a partnership by a secret act of bankruptcy of one of the partners has precisely the same effect, with respect to third persons, as a dissolution by private agreement between the partners. Thus, it has been held, that a solvent partner may, for a valuable consideration, dispose of the partnership effects, after the other partner has committed an act of bank-

(a) 5 East, 225.

(b) 2 Star. 290.

(c) 5 B. & Ald. 157.

ruptcy, and notwithstanding a joint commission afterwards issues against both partners, yet that the assignees cannot maintain trover against a *bonâ fide* vendee; *Fox v. Hanbury* (a). So, where one partner, after he had committed an act of bankruptcy, accepted a bill in the name of the firm, though on his own private account,—it was held, that the firm was liable to an innocent indorsee; *Lacey v. Woolcott* (b), *Craven v. Edmondson* (c).

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Mr. Swanston, in reply, was stopped by the Court.

ERSKINE, C. J.—The question in this case is, not whether a solvent partner is bound by the acts of his bankrupt copartner,—but whether, after one partner has committed an act of bankruptcy, the other partner can do any act which will have the effect of binding the joint estate of the two, when a joint commission is issued against the two,—notwithstanding the title of the assignees to the joint property relates back to acts of bankruptcy of both partners. And the Court is of opinion, that *Watts* could do no act to bind the joint estate, after the act of bankruptcy committed by his partner *Houghton*. For, if even a separate commission had issued against *Houghton*, his assignees would be tenants in common with *Watts* of all the partnership property, from the time of the act of bankruptcy committed by *Houghton*; and inasmuch as a joint commission followed against both partners, the case is still stronger against the validity of any acts done by *Watts*, after full knowledge of *Houghton's* bankruptcy; and in contemplation of his own. It was decided in the case

(a) Cowp. 445. (b) 2 Do v. & R. 460. (c) 4 Moore & P. 627.

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of *Ramsbottom v. Lewis* (a), that after a secret act of bankruptcy committed by one of two partners, the other could not, by an indorsement in the name of the firm, transfer a bill of exchange which existed before the act of bankruptcy; as the solvent partner was to be considered as tenant in common of the bill, along with the assignees of the bankrupt partner. The case of *Fox v. Hanbury* (b) merely decided, that a solvent partner might, after the bankruptcy of the other, dispose of his share in the partnership effects to a *bonâ fide* vendee for a valuable consideration, so as to make the purchaser a tenant in common with the assignees of the bankrupt partner; and that the assignees could not recover the property back in an action of *trover* against the vendee, because one tenant in common cannot maintain *trover* against another. *Houghton, or Watts*, may be personally responsible to *Robinson* upon these bills; but with that we have nothing to do; we merely decide that *Watts* could not, under the circumstances of this case, bind the joint estate by accepting bills in the name of the partnership firm, after his partner had committed an act of bankruptcy.

Sir J. CROSS concurred.

Sir G. ROSE.—Suppose an assignment was made by partners of all the joint property, and there was afterwards a secret dissolution of the partnership, what remedy could a creditor have, who afterwards takes a bill from one of them accepted in the partnership firm? He could not come upon the joint property, because it is previously assigned. He could therefore only take out execution against the separate property of each

(a) 1 Camp. 279.

(b) Cowp. 445.

artner. I agree with the Chief Justice, that the proof must be expunged.

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A discussion then arose as to the right to costs. but the COURT thought, that as the respondent had the judgment of the Commissioner in his favour, and as the material point on which the Court decided the case was not raised before the Commissioner, which might probably have prevented the respondent from litigating the question in this Court, the costs of both parties should come out of the estate.

Ex-parte TANNER and another.—In the matter of
LEE.

Westminster,
Jan. 25 and 26.

A Petition had been presented to stay the bankrupt's certificate, and supersede the fiat, on the ground that the bankrupt was not a trader, and that the fiat had been fraudulently issued with his contrivance, for the purpose of obtaining his certificate. On a former day, when the petition was called on, it was permitted to stand over, without prejudice, the petitioners consenting to withdraw so much of the petition as prayed the staying of the certificate, and to let it stand merely for the issuing of a supersedeas. An order was accordingly made for the allowance of the certificate; and the petition was now called on for hearing, as to the supersedeas. The attestation of the petitioners was in the following form:—"Signed by the petitioners *1. T. Tanner and C. Hall*, in the presence of *Timothy*

Where a bankrupt, who had been for some time previously living in *Brompton Square*, was described in the fiat "of *Arundel Street* in the county of *Middlesex*," where he had taken temporary lodgings, only four days before the issuing of the fiat; the fiat was superseded, on the ground of misdescription.

An objection to the attestation of a petition is not sustainable, after an order has been already made upon it.

Where such an objection is taken to the attestation of a petition for a *supersedeas*, it may be amended *instantly*; but not, if the petition is to stay a certificate.

Where an attestation was in the following form, "signed by the petitioners *A. B. and C. D.*, in the presence of *T. S.*, acting as solicitor for *A. T.* solicitor for the petitioners in this matter," and it appeared that *A. T.* was not a solicitor of this Court; *semble*, nevertheless, that the attestation was good, the petitioners having appeared by counsel.

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Surr, acting as solicitor for Mr. *A. T. Tanner*, solicitor for the petitioners in this matter."

Mr. *Swanston*, and Mr. *Bethell*, who appeared for the petitioning creditor and the bankrupt, objected, that this attestation was informal (*a*), and that Mr. *A. T. Tanner* was not an attorney of this Court, nor a solicitor of the Court of Chancery. Notice was given to Mr. *Tanner* of this objection to the petition, on the 15th December last. And as the case was allowed on the former occasion to stand over, without prejudice, the objection cannot be considered as having been waived.

ERSKINE, C. J.—As an order has already been made on this petition for the allowance of the certificate, I think it is too late now to urge any objection to the attestation. The objection, also, being merely technical, in point of form, the Court ought to look at it with the greatest jealousy. Literally, the form of the general order has not been complied with ; but as the object of it was to have the pledge of a respectable person, who should affix his name as a witness to the signature of the petitioner, the attestation in this case is a substantial compliance with the terms of the order. The order is, not that no petition shall be heard which is not attested by the solicitor of the petitioners, but that before the petition is presented it shall be so attested. With respect to the objection that Mr. *Tanner* is not an attorney of this Court,—although he may be personally responsible for acting as an attorney of the Court, without being duly admitted for that purpose,

(*a*) See general order of 12th August, 1809, and *Ex parte Hirst*, 1 G. & J. 76.

yet as the petitioners have already appeared by counsel, the objection cannot now be entertained.

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Sir J. CROSS.—If a motion had been made on this subject previous to the hearing of the petition, the Court might probably have entertained it. But now that the petition is called on, the suitor is not to be taken by surprise, because an objection is started, that the attorney he employs is not a solicitor of this Court. In regard to the attestation of the petition, the only object of the general order is, to lay down a rule of form for the purpose of verifying the petition. But here, the petitioners having made affidavits, and acknowledged that they are the petitioners, are therefore sufficiently before the Court.

Sir G. ROSE.—The only effect of an objection as to the attestation to a petition for a supersedeas is, that the petition may be amended *instantly*, if the parties are in Court, upon payment of costs. It is different, as to petitions to stay a certificate. But in the present instance, the bankrupt has got his certificate, and the petition now before the Court is only for the supersedeas. When the Court allowed the petition to stand over, it was on the condition that it should not work injustice to any party; they therefore ordered the certificate to go, and the petition to stand for a supersedeas. The whole extent of the objection is, that the attestation may be amended. But I think the attestation a good one.

The COURT, after some deliberation, permitted the hearing of the petition to be proceeded with, with-

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out prejudice to any future application against Mr. *Tanner*.

Mr. *Montagu*, and Mr. *Seton*, in support of the petition. The bankrupt in this case was not a trader, but merely filled the situation of a clerk in the Custom-house. The only instances of trading proved were, that the bankrupt on one occasion bought three dozen of wine, and sold a part of it again, in the name of another person,—that he afterwards bought a hogshead of claret, which he divided into small parcels among his friends,—and that he on one occasion chartered a vessel, and received the usual brokerage. The trading was therefore colourable, and the party was also mis-described, for the purpose of misleading the creditors. The bankrupt had lived for some time at *Brompton Square*, and had a place in the Long Room at the Custom-house; and yet, instead of his being described as of either of those places, he was merely described as of “*Arundel Street, in the county of Middlesex*,” where he had taken temporary lodgings, only four days before the docket was struck. In *Ex parte Shadbolt*, (a) a commission was superseded, because the bankrupt was not described of the place where he was generally known, but of an obscure place to which he afterwards removed. Mr. *Montagu* was then proceeding to read an affidavit to show that the bankrupt was not a *bonâ fide* trader, when

Mr. *Swanston*, and Mr. *Bethell*, objected to the affi-

(a) 1 Mont. 89; and see *Ex parte Day*, 1 Mont. & M., which requires the subsequent place of residence to be also inserted in the description. See also *Ex parte Dart*, ante, p. 548.

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davit being read, on the ground that as the bankrupt had already got his certificate, any objection that might now be urged to the trading, must be confined to a defect of proof of trading appearing on the face of the proceedings; and that the other side could not now introduce circumstances, which did not apply to the trading specified in the deposition before the Commissioners; *Ex parte Crowder* (a), *Ex parte Levi* (b). [Sir G. Rose. If the petition had been to recall the certificate, then these observations would apply.] This petition was answered on the very day when the bankrupt was entitled to his certificate. It would have been different, if the petition had been presented, before the certificate had gone to the Lord Chancellor for allowance. [Sir G. Rose. The certificate cannot be said to be obtained by the bankrupt, until it is allowed by the Lord Chancellor, and delivered out of the office. If £20,000/. had come to the bankrupt before it left the office, the money would have gone to the creditors, and not to the bankrupt. *Erskine*, C. J. In the two cases cited, the reason why the requisites to support the commission were not allowed to be disputed, was, because the bankrupt had already obtained his certificate. But here, the certificate was not obtained, when the petition was presented.] This must be considered as a new application; for the petition now stands upon a different footing from what it did when it was first presented, having been withdrawn as to staying the certificate, and praying now only for a supersedeas; the present petition must therefore be considered as not presented until after the certificate was obtained.

(a) 2 Rose, 324.

(b) Buck, 75.

1833.

Ex parte
TANNER
and another.

The COURT, however, said the principle was well settled, and overruled the objection.

Mr. *Swanston*, and Mr. *Bethell*, then proceeded on the merits. *First*, with respect to the alleged mis-description of the bankrupt, we contend it was a true description; for it stated the bankrupt's real place of residence when the fiat issued, which was "Arundel Street, in the Strand." [Sir *J. Cross* referred to the case of *Ex parte Beadler*, (a) where the omission to describe the bankrupt as of the place where he actually traded, was held to be fatal.] That case was decided on the ground, that the description of the bankrupt was a false one. Whenever a commission has been superseded for mis-description, the description has been uniformly untrue; there is no case of a supersedeas being granted, where the description has been true. There was no fraud intended in this case by the bankrupt's change of residence; his removal from *Brompton* to *Arundel Street* being with no view of bankruptcy, but occasioned by his landlord seizing his goods for rent. And that he had no intention to deceive his creditors is manifest; for soon after the fiat issued, he wrote to his creditors, stating that he was the person who was the subject of it; his removal from *Brompton*, therefore, was caused merely by the proceeding of his landlord. With respect to the *trading*, the bankrupt is described in the deposition as *Broker* and *Commission Agent*, and that species of trading has not been impeached. The 6 G. 4. c. 107. s. 139., recognizes the trading of Custom-house agents, in the business of

(a) 2 G. & J. 243.

entering or clearing ships or goods, provided they are licensed by the Commissioners of the Customs. And the bankrupt has stated in his schedule, that, during the last five years, various consignments were made to him, from which he derived a profit of 3,500/. The debts proved under the fiat amount to 6,000/., and only these two creditors, neither of whose debts exceeds the sum of 30/., petition now to stay the certificate.

1833.

Ex parte
TANNER
and another.

Cur. adv. vult.

ERSKINE, C. J.—The Court directed this petition to stand over for judgment, that we might endeavour to ascertain with greater certainty, whether the party, against whom this fiat has been taken out, was really a subject of the bankrupt laws or not. As the present fiat would have the effect of protecting the person of the bankrupt, though not his property, there having been a former commission issued against him, I should have been very glad to have supported the fiat, if I could in any way have considered myself justified in so doing. But I have a public duty to perform, however adverse it may be to my wishes on the present occasion. This petition is presented by two creditors of the bankrupt, praying for a supersedeas, on the ground that the fiat was issued to serve the bankrupt's purposes, and not for the purpose of distributing his property among his creditors. The objections to the fiat are, first, that the bankrupt was not a trader; secondly, that the description of him in the fiat was likely to mislead. And I think that both these objections must prevail. The bankrupt is described in the fiat as, of "*Arundel Street*, in the county of *Middlesex*, Commission Agent," although a few days before the docket was struck, he

January 26.

1833.

Ex parte
TANNER
and another.

was living in *Brompton Square*, and filling a situation in the Custom-house. Now, could any of his acquaintance have possibly known him by that description? But then it has been urged, that there was no intention to mislead, as he wrote circular letters to his creditors, informing them that he was the person against whom the fiat had been issued. It is difficult to say what was his motive for this proceeding; but, at all events, it would be unsafe for us to act upon the principle contended for. I will take it as he says, that he wrote to *all* his creditors to apprise them of the fact. But it is not for the bankrupt to give a false description of himself in the fiat, and then say, that he has written to his creditors to tell them that he was the person intended. The practice of the Court, to supersede a fiat for misdescription, is founded on general principles; and it would be a dangerous departure from the rule, to allow the defect to be remedied by a subsequent communication of the bankrupt to his creditors. His object appears to have been, independently of any question of fraud, to prevent it from being publicly known that he had become a bankrupt. If he had been, therefore, even a *bonâ fide* trader, yet a fiat containing such a misdescription of him could never have been supported. *Ex parte Parrey* (a) is an express authority, that a commission, wholly omitting to describe the bankrupt of the place where he had chiefly been known as a trader, is bad, though his last place of trading even were correctly described. Then, as far as the question of trading is concerned, I am of opinion, that this party was not a proper subject of the bankrupt laws. He states in his schedule, that his profits for the last five

(a) 2 G. & J. 225.

1888.

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Ex parte
TANNER
and another.

years have amounted to 3,500*l*. Now, if he had derived those large profits from any species of trading, it would surely have appeared in some of his books, how and with whom he dealt. He was challenged by the statements in this petition to give evidence of his trading, and yet none but the most trifling and unsatisfactory instances have been produced. There is no doubt in my mind, that the sole object of issuing this fiat was, to enable the bankrupt to get his certificate; and that it was intended merely for his own benefit, and not for the benefit of his creditors. Under these circumstances, therefore, it is not consistent with the duty of the Court to permit the fiat to stand.

Sir J. Cross.—I entirely agree with the Chief Judge, that the only object sought by the bankrupt under this fiat was the obtaining his certificate; for there being no property to divide, it could not have been issued for the benefit of his creditors. The only question I have thought it necessary to direct my attention to, is the trading. Where are his books? None are produced. Where are his customers? Not one is to be found. It is said in one of the depositions, that for the last fifteen years he has been a trader; but no specific act of trading is stated. The only evidence is, that ten years ago he was declared a bankrupt under a former commission; so that the deposition may be literally true, though he had not traded once during the last ten years. Then the deposition is defective, as to the act of bankruptcy; for the witness says, that he one day heard the bankrupt say in the Long Room at the Custom-house, that if any one should call about bills, they should say he was not there; and that a person did


1838.

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Ex parte
TANNER
and another.

call, while he was there. But there is no evidence that the bankrupt absented himself when the party called, or that the party calling was in fact a creditor. Independently, therefore, of any other objection, the assignees could not work this fiat, on account of the depositions both of the trading and the act of bankruptcy being imperfect.

Sir G. ROSE.—The description of the bankrupt in the fiat is, on the face of it, imperfect, and essentially untrue. The whole truth ought to have been given, and he would then have been described as “late of *Brompton Square*, and carrying on business at the Custom-house.” Upon the other points, also, I concur in opinion with their Honours. With respect to the question of costs, the practice has been, that when a commission is superseded on a point of law, costs are given only against the petitioning creditor; but when superseded on the ground of fraud, then costs are given against all the parties implicated.

The order was, therefore, that the fiat should be annulled, at the costs of the petitioning creditor and the bankrupt.



1833.

Ex-parte Hicks and others.—In the matter of **SMITH.**

*Southampton
Buildings,
February 16.*

THIS was a petition by the assignees of the bankrupt, that Messrs. *Murray* and Sons, solicitors, might be directed to pay over to them the sum of 409*l.* 2*s.*, which was alleged to belong to the bankrupt, and which they had received as his solicitors in a cause in Chancery, under an order of that Court, after the act of bankruptcy, and shortly before the issuing of the fiat. The further facts are stated in the arguments of counsel.

A summary application being made against three attornies, jointly, to pay over to the assignees a sum of money which they had received as the bankrupt's solicitors under an order of the Court of Chancery; Held, not sustainable, as they were not all collectively attornies of this Court.

Mr. *Bethell*, and Mr. *Bacon*, for the petitioners, contended, that inasmuch as the solicitors admitted, on examination before the Commissioners, that they had this money in their hands, without claiming any lien on it; and as they were officers of this Court, over whom the Court had jurisdiction; they were clearly bound to pay over the property to the assignees. The money was received by Messrs. *Murray* in their professional character, which was quite sufficient to give this Court jurisdiction over them. If no bankruptcy had intervened, then it is clear, that the bankrupt might have claimed the money from them; and as bankruptcy had happened, it passed to his assignees, *re Aikin* (a); for money in the hands of an agent of the bankrupt, without a lien, is always considered the property of the assignees. It is true, that in this case an action had been commenced by the bankrupt to try the validity of the commission; but that could form no objection to the payment over of this money. If it could in this case,

Quære, whether such an order would have been made, if they had been all attornies of this Court.

(a) 4 B. & A. 47.

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Ex parte
Hicks
and others.

it would apply in all cases; and the fair and speedy division of the bankrupt's property among his creditors would be altogether frustrated. As long, however, as the fiat existed, every person was bound to recognise it as valid, and to act accordingly in conformity with it.

Mr. *Swanston*, and Mr. *O. Anderdon*, for Messrs. *Murray* and Sons. The first objection to this petition is, that the bankrupt is not served with it. He is clearly interested in it, as it seeks to take money belonging to him out of the hands of his agents; and therefore he is entitled to be heard. It is an application, the effect of which will be to deprive the bankrupt of the only means, by which he can defend his rights against this commission elsewhere. But the principal objection to this petition is, that Messrs. *Murray* and Sons are not proved to be officers of this Court; for, although in an affidavit of the petitioners they are *stated* to be such, there is no distinct averment to that effect; the statement in the affidavit amounting in fact to a mere description, and not to an assertion. We deny the fact, *ore tenus*, leaving it to be established by the best evidence, which ought always to be adduced,—as in the case of an averment *prout patet per recordam*. Now we assert, that if the records of this Court be referred to, but which the other side decline to do, it will be found, that although Mr. *Murray* and one of his sons are attornies of this Court, yet that the other son, against whom this application is also directed, is not admitted an attorney in this Court. The money was received by them in their joint capacity, and any order to affect them must be therefore jointly against the three. If one of them is not bound to obey the order, neither

1893.

 Ex parte
 Hicks
 and others.

can the rest. The assignees come here against persons, then, who may all be said to be not solicitors of this Court, who are all strangers to the commission, and against whom the Court has consequently no jurisdiction. It would be impossible, therefore, for the Court to enforce its order in this case, by striking the party off its rolls. Under this state of circumstances, the present application amounts to nothing more than a petition for money had and received; a course of proceeding never heard of, nor supported by any case or precedent. In point of principle it is also bad; for unless a bankrupt had, and was allowed to retain, money in the hands of third parties, he never could dispute the validity of any commission issued against him; and even were all these parties solicitors of this Court, it is not an arbitrary and inflexible rule, that the Court will compel an attorney to deliver up papers or money upon which he has no lien (*a*). It always rests in the discretion of the Court, whether they will make such an order or not; and in this case the Court will refrain from making such an order, where it would work so manifest an injustice to the bankrupt. An action has already been brought to try the validity of this commission, and will be decided in a short period of time.

Mr. *Montagu*, *amicus curiæ*, referred to the case of *Ex parte Hawkins* (*b*). .

The COURT concurred in the argument for the respondents; observing, that as the money was received under an order of the Court of Chancery,—as the

(*a*) *In re Lowe*, 8 East, 237.

(*b*) *Mont. & Mac*, 11.

1893.

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Ex parte
Hicks
and others.

solicitors were not collectively officers of this Court, but were in fact third parties, over whom the Court had no jurisdiction,—and as it was impossible to give the solicitors an indemnity against any claim by the bankrupt in another Court, if they now paid over the money to the assignees,—the Court could not entertain this petition. The bankrupt, they added, ought also to have been served with the petition, as an order was sought by it adverse to his claims. And even if the solicitors had been all of them officers of this Court, it was still very doubtful, if the Court had the power to make the order as prayed for,—or would do so, in the exercise of its discretion, if it possessed such power. But their being all collectively officers of the Court, was the only thing that could give jurisdiction; and that fact must be established by reference to the records. As the trial, however, was so close at hand, the Court ordered the matter to stand over, until the result was known (a).

(a) The trial at law was afterwards decided in favour of the bankrupt; so that the fiat was ultimately annulled by an order of this Court.

Southampton
Buildings,
February 18.

Ex parte BUFFERY.—In the matter of BOWDLER.

Where a trustee becomes bankrupt, a new one may be appointed, on petition, without any reference to the master; although the bankrupt had no portion of the trust property in his hands.

THIS was an application to appoint a new trustee in the room of the bankrupt, who had no interest whatever but that of a mere trustee, and had not in his hands any portion of the trust property.

Mr. *Dixon*, for the petitioner.

Mr. *Bligh*, for the bankrupt, submitted that it was

question of some doubt, whether this Court had jurisdiction to make any such appointment. It is true, at the 5 G. 4. c. 16. s. 79. gives a general power to the Lord Chancellor to appoint a new trustee, where the original one had become bankrupt; and that the 2 & 3 W. 4. c. 56., transfers all the powers of the Lord Chancellor, except in certain cases, to this Court. In both the reported cases which have occurred on this point (a), it would seem, that to induce the Court to exercise this power, it should also be necessary to pray some proof against the bankrupt's estate, in relation to funds which at the time of the bankruptcy were in his hands. Here, as there were no funds in the bankrupt's hands, no such proof can be sought.

1833.

Ex parte
BUTTERY.

The COURT thought, that in all these cases a new trustee was appointed, on petition in bankruptcy; and that the circumstance of the bankrupt not possessing any funds belonging to the trust, could make no difference; inasmuch as the statute provided for the case of a bankrupt trustee "being *entitled* to" property,—thereby clearly evincing, that the absolute possession of the property was not necessary to give the Court jurisdiction. And Sir G. Rose suggested, that he saw no reason why the appointment could not be made by this Court, without the expense of a reference to the master, although the latter course was the more usual.

The order was accordingly made, without any reference: and the costs of the bankrupt were directed to be paid out of the trust fund.

(a) *Ex parte Saunders*, 2 G. & J. 132; *Ex parte Inkersole*, id. 230.

1838.

Southampton
Buildings,
February 23.

Ex parte JOHN BENTLEY.—In the matter of
JOHN BENTLEY.

The solicitor for the petitioning creditor, on the commission being superseded, writes to the bankrupt, "I am ready, and hereby offer, to allow and pay the costs" incurred by the bankrupt in petitioning for the supersedeas. *Held*, that the solicitor was personally liable on this undertaking, and that the bankrupt might petition for an order on the solicitor to pay these costs, notwithstanding a subsequent commission had issued against him, under which he had not obtained his certificate,—his assignees disclaiming all interest in the matter.

THIS was a petition for an order on the solicitor of the petitioning creditor to pay certain costs.

The petition stated, that in April 1829, a commission issued against the petitioner, at the instance of *John Archdale Palmer*. In May 1829, the petitioner presented a petition to supersede the commission, which was duly served on the respondents; in consequence of which, on the 3d June 1829, he and his solicitor were served with the following notice from *A. B.*, the solicitor for Mr. *Palmer*.

"In the matter of *John Bentley, &c.*

"On behalf of *John Archdale Palmer*, the petitioning creditor, I do hereby give you notice, that by an order of the Lord Chancellor, dated the 23d May 1829, his lordship was pleased to order and direct the said commission to be superseded at the costs of the said petitioning creditor, and that a writ of supersedeas should issue accordingly. And I give you further notice, that the said commission has been superseded accordingly, at such costs and charges; copies of which said order and writ respectively are herewith annexed. And on such behalf as aforesaid, I give you this further notice, that *I am ready, and hereby offer, to allow and pay* the costs of a petition presented by you the said *John Bentley* to the Lord Chancellor for the purpose of superseding the commission; but which said petition it is now become unnecessary further to prosecute or proceed with.—Dated the 3d June 1829.
Yours, &c. *A. B.*

"To Mr *John Bentley* above named, and Mr. *Charles James Tapp Burt*, his solicitor."

1833.

 Ex parte
BENTLEY.

The costs incurred by the petitioner up to the date of this notice, amounted to 16*l.* 6*s.* 6*d.*, a bill of which was delivered to Mr. *Palmer*'s attorney. And on the 31st July following, Mr. *Burt*, the petitioner's solicitor, received the following letter :—

"*Re Bentley.*"

"I am directed by *A. B.* to remind you, that on the 4th June last, a notice was served, stating that this commission was superseded, and that *A. B.* was ready, and offered, on behalf of the petitioning creditor, Mr. *Palmer*, to pay the costs of your petition down to the date of the 4th June, and hereby repeats his offer to do so. And that if you call on your petition, notwithstanding such offer and notice, it will be appeared to on behalf of Mr. *Palmer*, and an application made to the Court that the subsequent costs be paid by yourself. I am, Sir, for *A. B.*, yours, &c. *G. Whatton.*

To Mr. *Burt*, solicitor."

After various applications for payment, Mr. *Burt*, on the 1st October 1829, wrote the following letter to Mr. *Palmer*'s solicitor :—**"Sir, If the amount of my bill of costs is not immediately paid to me, I beg to inform you I shall present a petition against you upon your undertaking, which I trust your compliance will prevent. Yours, &c. *C. J. T. Burt.*"**

The present application was for the payment of this bill of costs, against the solicitor for Mr. *Palmer*, the petitioning creditor. The affidavits in opposition went to show, that neither the petitioner, nor Mr. *Burt*, ever applied to Mr. *Palmer* for these costs, although they had frequent opportunities of so doing; that at that

1833.
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Ex parte
BENTLEY.

time *Palmer* was able and willing to pay the costs, had they been properly taxed ; but that in December 1829, having fallen into difficulties, he became bankrupt, and had left the kingdom. And his attorney now contested the right of the bankrupt to make the present application, insisting that the construction put by the bankrupt upon the foregoing letters, of the attorney being personally responsible for the costs, was not the right construction. It was stated, also, that all correspondence or communication between the parties, on the subject of the payment of the bill of costs, had ceased since October 1829, and that the present petition was not presented until the 30th January 1833.

Mr. *Montagu*, and Mr. *Richards*, for the petitioner, relied on the wording of the letters of Mr. *Palmer's* attorney, and his clerk, as sufficient to imply a personal undertaking to pay these costs ; and referred to the case of *Appleton v. Binks* (a).

Mr. *Swanston*, and Mr. *Bagshawe*, for the solicitor, contended, that it was never his intention to give more than the usual professional undertaking, that his client should perform a certain act. There was no consideration for his giving a personal undertaking ; neither do the words of the letters allow such a construction. It is clear, that no action could be maintained on this undertaking ; and the Court is bound to look into the circumstances under which the letters were written, which afford no grounds for supposing that a personal undertaking could ever have been intended. But even admitting that this was a personal

(a) 5 East, 148.

1833.

Ex parte
BENTLEY.

undertaking when the letters were written, it can only extend to make the solicitor a surety for his client. And although it may be admitted, for the sake of argument, that if the petitioner had come promptly, he would have had a just claim against the solicitor personally; yet, looking at the variation of the state of circumstances of the parties, and taking into consideration the laches of the petitioner and Mr. *Burt*,—the time that had been suffered to elapse,—the fact, that Mr. *Palmer* during that lapse had become bankrupt, and that his surety had lost all remedy, the Court will not listen to the present application. There is, however, another objection, which is this,—that the petitioner is an uncertificated bankrupt, and therefore can have no right to these costs; which either belong to his assignees, or to Mr. *Burt*; and the latter has, in fact, proved for these very costs under a commission, which he has himself subsequently issued against Mr. *Bentley*. The assignees therefore are, if any persons, the right claimants in this case; but they, it is understood, disclaim all interest whatever in the matter.

Mr. *Russell* appeared for the assignees, and acknowledged such disclaimer on their part.

Mr. *Montagu* was not called on to reply.


The COURT said: This is clearly a personal undertaking to pay the amount of the costs; to put any other construction on it, would be to substitute for “I undertake,” “he (Mr. *Palmer*) undertakes.” With respect to the objection that has been urged on the ground of laches, and the absence of any application for the amount of the bill

1833.

Ex parte
BENTLEY.

to Mr. *Palmer*,—that might fairly be taken to have arisen from the construction that Mr. *Burt* was entitled to put upon the letters, viz., that Mr. *Palmer's* solicitor was personally bound to pay the costs. The present undertaking is quite distinct from the usual professional undertaking. Mr. *Palmer's* solicitor, when he wrote the letters, either had the money actually in his hands wherewith to pay these costs,—or else he considered himself personally responsible, and bound to pay them, by the failure on his part to support the commission which had been issued under his advice. The assignees, however, need not have appeared upon this petition; for the bankrupt alone was perfectly competent to support this claim, if they did not intend to dispute his right. It is, therefore, improper to visit the solicitor with their costs.

The order was, that the solicitor should pay the bill of costs, to be taxed, and the costs of the petitioner upon this application,—reserving to the solicitor the benefit of any claim which he, or the assignees, might have against Mr. *Palmer's* estate. The costs of the assignees on this petition were directed to come out of the bankrupt *Bentley's* estate.



1833.

**Ex parte ROBINSON.—In the matter of HOUGHTON
and WATTS.**

*Southampton
Buildings,
March 12.*

THIS was an application to dispense with the signature of a petitioner to a petition of appeal, on a special case, from an order which had been made on the 14th February last, expunging a proof.

The Court of Review has no jurisdiction to dispense with the signature of the petitioner to a petition of appeal, under the 1 & 2 Will. 4. c. 56. s. 32.; the Lord Chancellor being the proper authority to apply to for that purpose.

Mr. *Wilcock*, in support of the application, stated, that from the petitioner residing in the country, his signature could not now be obtained, within the month limited by the act of parliament (*a*).

Semble, that the period of a month, limited by the statute for presenting the petition of appeal, cannot be extended.

The COURT thought they had no jurisdiction in the matter, the Lord Chancellor being the proper judge to apply to, under these circumstances. And that, even if they had jurisdiction, they would not have the power to extend the time limited by the act of parliament for presenting the petition of appeal; and that it would be the bounden duty of the Court to take every care, that petitions of appeal were presented by the parties themselves; the best means of insuring which was, to require their own signatures to all such petitions.

(*a*) 1 & 2 W. 4. c. 56. s. 32.

1833.

Southampton
Buildings,
March 19.

Bankrupt executor ordered to prove against his own estate, and the assignees to pay the dividends into the hands of the Accountant General, to the credit of a cause pending for the administration of assets.

Ex parte COLMAN.—In the matter of COLMAN.

MR. HALLETT applied to the Court for an order, that a bankrupt executor might be at liberty to prove against his own estate, for the amount of the trust property in his hands; a cause having been instituted in Chancery for the administration of the assets.

The COURT directed the proof to proceed, and that the assignees should pay the dividends into the bank in the name of the accountant-general, to the credit of the cause.

Ex parte PAINTER.—In the matter of ASSERETTI.

Same day.

Bankrupt trustee ordered to be removed, and to convey the trust property to a new trustee, under the 79th section of the Bankrupt Act; but no necessity for the assignees to join in the conveyance.

MR. RICHARDS applied for an order, that a bankrupt trustee might be removed, and a new one appointed in his stead; and that the bankrupt, and his assignees, might be ordered to convey the trust estate to the new trustee.

Mr. Twiss, for the assignees, objected to their being made parties to the conveyance.

The COURT said, that as the trust estate did not pass to the assignees, there was no need for their joining in the conveyance, considering the words in the 79th section of the Bankrupt Act, respecting the assignees conveying, to be superfluous; but they directed the new appointment, and that the bankrupt should convey as prayed. The costs to be paid by the petitioner, who was entitled to be reimbursed out of the trust fund.

1833.

Ex parte WILKINSON.

Southampton
Buildings,
March 21.

THE bankrupt's certificate had in this case been signed personally by all the creditors of the bankrupt, except one, and had been also allowed and signed by the Commissioner. The signature of the other creditor was under a power of attorney, which was as follows:

A power of attorney to sign a bankrupt's certificate, executed by a creditor resident abroad, is sufficiently authenticated, if attested by the British consul.

" 1833, in Salonicas. On the 17th January personally appeared Mr. *W. B. Llewellyn*, who requested a power of attorney for the purpose of signing the certificate of *Richard Wilkinson*, a bankrupt. We hereby" &c. (appointing Mr. *John Simmons* attorney,) "do sign a full and complete discharge for the debt proved by the said *W. B. Llewellyn*," "and the aforesaid *W. B. Llewellyn* has signed the present act of power of attorney in presence of us, acting consul of this office, and witnesses.

(Signed) *W. B. Llewellyn*. (L. S.)

Witnesses, *A. B. & C. D.*

Signed, sealed, and witnessed in my presence,

(Consulate Seal.) *Z. Y. consul.*"

It was sworn by a merchant in London, that the handwriting of the attesting witness and the consul was genuine. But the secretary of bankrupts had some doubts, whether this was sufficient to authenticate the execution of the power of attorney; and if so, whether the power was in itself a sufficient authority to Mr. *Simmons* to sign the bankrupt's certificate. The object of the present application was, that the certificate might be allowed.

Mr. *Montagu* appeared in support of the application.

1833.

Ex parte
WILKINSON.

The COURT was of opinion, that the document was in all respects sufficient, being attested by the British consul; and therefore directed the certificate to pass (a).

(a) See also *Ex parte Myers*, 1 Dea. & Ch. 406, and note there.

Southampton
Buildings,
March 21.

Ex parte REAY.—In the matter of LEECH.

The costs of proceedings in this Court, under a London fiat, are to be referred to the Deputy Registrar for taxation; the duty of the Commissioner being merely to tax the petitioning creditor's costs, and the costs of the assignees.

IN this case, the costs of a petition had been ordered by the Court to be taxed by the Commissioner; who had declined to proceed upon the order, on the ground that the Court had no authority to order a Commissioner to tax the costs in the present instance.

Mr. Twiss now moved, that the Commissioner might be directed to proceed with the taxation.

Mr. Bethell, contra.

The COURT thought, that there was an oversight in the order which they had made in this matter; as they had no authority to impose this additional duty on the Commissioner; and they directed therefore the costs to be taxed by the deputy registrar. And, as to the future

PRACTICE,

It was ordered, that the costs of all proceedings in this Court, in town fiats, should be referred to their own officer, Mr. Gregg, the deputy registrar, for taxation; and that no reference should in future be directed to a master for this purpose. The Commissioners would merely tax the petitioning creditor's costs, and the costs of assignees under the fiat.

Ex parte ALEXANDER BRYMER BELCHER, and
others.—In the matter of JOHN MABERLY.

1833.

Southampton
Buildings,
March 22.

THIS was the petition of the official assignee, and the other assignees of the bankrupt, presented under the following circumstances. The bankrupt had mortgaged certain farm lands to several of his creditors, and the Commissioner had, upon their application, ordered the lands to be sold by public auction on the 16th April 1833. The assignees stated, that the property was not worth the amount of the mortgage debts; and that it would be very advantageous to the interests of the general body of creditors, if the farms were placed in a state of cultivation prior to the sale, and the sale postponed until the end of May, going on with the cropping and cultivation in the meantime. The assignees accordingly prayed the postponement of the sale until the 23d May, and that they might be permitted to cultivate the farms in the interim; and that it should form one of the conditions of sale, that the purchaser should pay for such cropping and cultivation, as between an in-coming and out-going tenant. The petition was signed by *A. B. Belcher*, the official assignee, and was supported by the affidavit of Mr. *Maberly's* former land steward.

An application of the assignees to postpone the sale of mortgaged property, refused, where the mortgagee objects to such postponement.

It is no objection to a petition, that the official assignee has signed it; his signature being merely surplusage.

Mr. *Montagu* appeared in support of the petition.

Mr. *Phillimore*, for the mortgagees, took a preliminary objection to the petition. The official assignee ought not to have presented it, having no right to interfere in any litigated matter pending between the general assignees and any other parties, under the bankruptcy. No such duty was imposed on him by

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the 1 & 2 *Will.* 4. c. 56. s. 22; and by s. 23, an official assignee was expressly precluded from any interference in matters of sale, relating to the property of the bankrupt.

The COURT, however, overruled the objection; and said, that this was in fact the petition of the general assignees; for that they would presume it to be merely a matter of convenience, that the assignees had not signed the petition; and that the official assignee joining in the petition would, at most, amount to mere surplage.

Mr. *Montagu*, in support of the petition, then put the case of a mine, which might happen to be inundated at the time of a proposed sale. It would be clearly a matter of justice to the creditors, that the sale should be postponed, in order that the mine might be restored to a marketable state. Under the general order of Lord *Loughborough* (a), it seems to be in the discretion of the Commissioner to appoint a time and place for sale; and all we ask is, to postpone it until May, on the ground that the whole estate of the bankrupt will derive considerable benefit from such postponement; and it is fair, that the assignees should be reimbursed their expenses out of any extra sum which the estate will, by the means proposed, be likely to realize.

Mr. *Phillimore*, contra, said that the mortgagees were entitled to an immediate sale. They had also a right to the rents and profits of the estate, from the

(a) 8 March 1794.

date of the order until the time of sale; *Ex parte Bignold* (a).

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Sir G. ROSE said, that in these cases the only question was, who was entitled to the mesne profits between the sale and the date of the order. If the mortgagee does not consent to the postponement of the sale, the Court has no right to interfere. Nor could any Court, where a power of sale is given by the mortgage deed, stop the exercise of such power, unless the mortgage debt be first paid off. The order in bankruptcy gave to the mortgagee the same power of sale, though in a more limited form; and the Court had therefore no power to stop it.

The rest of their Honors concurring,

The petition was dismissed with costs.

(a) 2 G. & J. 273.

Ex parte Sir CHAPMAN MARSHALL, and Sir WILLIAM HENRY POLAND, late Sheriff of Middlesex.—In the matter of JOHN FOX.

Southampton
Buildings,
March 22.

THE petition in this case stated, that previous to the issuing of a commission against *John Hillary Suwer-*

A sheriff having seized a defendant's goods, against whom

a commission of bankrupt subsequently issued, the goods are claimed by *A. B. and C. D.* the assignees; upon which the sheriff delivers up the goods to them, taking from them a joint bond of indemnity against all loss, charges, &c. which he might sustain by quitting possession, and returning *nulla bona*. An action is brought against the sheriff by the execution creditor for a false return, and a verdict obtained against him for 800*l.* *A. B.*, one of the co-obligors in the bond, afterwards becomes bankrupt, but before the sheriff had paid the amount of the verdict. *Held*, that the sheriff could not as yet prove under this bond, having sustained no actual pecuniary loss; but that as the damage was inchoate, he was entitled to have a claim entered, with a reservation of dividends.

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krop, a writ of *fieri facias* directed to the petitioners, against the goods of *J. H. Suwerkrop*, at the suit of *James Mahoney*, for 3800*l.* debt, and 65*s.* damages, was, on the 30th June 1831, executed by the petitioners. On the 9th August 1831, a commission of bankrupt issued against *Suwerkrop*, and *John For* was chosen assignee together with *George Frasi*. These assignees claimed the goods so seized under the *fi. fa.*, in consequence of which the sheriff quitted possession, and made a return of *nulla bona*; first taking, however, a bond of indemnity from the assignees, in the penal sum of 2000*l.* This bond was dated the 12th October 1831, and the condition of it was as follows: “Whereas the above-named sheriff, by virtue of his majesty’s writ of *fieri facias* to him directed against the goods and chattels of *J. H. Suwerkrop*, in the bailiwick of the said sheriff, returnable &c. at the suit of *James Mahoney*, for 3800*l.* debt, and 65*s.* damages, hath seized and taken in execution divers goods and chattels of the said *J. H. Suwerkrop*, in the bailiwick of the said sheriff; and whereas the said sheriff hath received notice that the said *J. H. Suwerkrop* hath become bankrupt; and the above-bounden *J. For* and *G. Frasi* have accordingly requested the said sheriff to quit possession of the said goods and chattels, and to return *nulla bona* to the said writ of *fi. fa.*, and they have proposed to indemnify the said sheriff for so doing; to which the said sheriff hath agreed. Now the condition of the obligation is such, that if the said *J. For* and *G. Frasi*, their heirs, executors, administrators, some or one of them, do and shall from time to time, and at all times hereafter, well and sufficiently save, defend, keep harmless, and indemnify the said sheriff, his under-sheriff, and all others acting under

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The question was, whether, under these circumstances, this was a debt provable under the 56th section of the 6 Geo. 4. c. 16.

Mr. *Swanston*, and Mr. *Montagu*, for the petitioners. The present question is settled by the late case before this Court, of *Ex parte Myers*, in the matter of *Sudell* (a), which is all fours with this case. There is no doubt but that, according to the words of the 6 Geo. 4. c. 16. s. 56., the bankrupt had contracted a debt before the issuing of the commission, which was provable on a contingency happening after the commission, namely, on the verdict being given against the petitioners; and this verdict, we contend, is sufficient for the purposes of the act. The 56th clause was inserted in the act, for the purpose of preventing an evil which frequently arose before that act was passed, from the inability of creditors to prove, who had claims not absolutely payable at the time of the bankruptcy. In that act, however, a provision is contained for setting a value upon this kind of debt; and it was thereby intended, that all debts and liabilities should be included, which depended upon the happening of a contingency. The case before the Court comes within the second part of the section, viz. where the contingency has happened after the bankruptcy. The clause provides, first, for valuing a debt where the contingency has not happened; and secondly, for allowing proof where the contingency has happened; which must mean, where it has happened subsequently to the commission; there being no need of providing for the allowance of proof, where the contingency had happened before the date of the commission. Without the

(a) 2 Dea. & Ch. 251.

verdict, it is not contended that the petitioners would have been entitled to prove; but that has ascertained the damage, and our equity thenceforth arises. [Sir *G. Rose*. It is manifest, that if this Court should decline going the length of admitting you to prove, yet it would not allow the whole estate to be eaten up, without allowing you to enter a claim. Sir *J. Cross*. Under the 31st section of 1 & 2 *Will.* 4. c. 56., the Commissioner was empowered to set apart sufficient funds to answer this claim, in case this Court should ultimately decide in your favour.] So it is in section 53 of the 6 *Geo.* 4. c. 16., as to bottomry and respondentia bonds; the obligee is entitled to enter a claim, and when the loss has happened, he is then entitled to convert his claims into a proof. [Sir *G. Rose*. Does it appear, that the petitioners have already sustained actual damage by having paid the amount of the verdict? If not, they cannot be allowed to prove.] That does not certainly appear to be the case; but we are, at least, entitled to the other part of the prayer of our petition, viz., to enter a claim, reserving sufficient assets to answer it. In *Cullen's Bankrupt Laws*, p. 137,—after observing upon the law as it stood at that time, before the 6 *Geo.* 4. c. 16.,—it is laid down, that if a bond to indemnify is forfeited *before* the bankruptcy, the surety may prove the whole, though he does not pay at all until *after* the bankruptcy; the penalty creating a debt at law, of which the Court will take advantage, to enable the party to come in under the commission." And it is clear, that under the 6 *Geo.* 4. c. 16., we have a right,—if not to prove at once,—at any rate, to enter a claim, reserving the dividend.

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Mr. *Twiss*, and Mr. *Rogers*, for the assignees. This claim can, under no circumstances, be ever ripened into a proof by any party. The case of *Ex parte Myers* (a) was one, where the amount of the debt was certain, and is therefore not applicable to the case before the Court. For here the damage to be sustained is altogether uncertain; the amount of costs and expenses is also uncertain; and indeed the whole claim under the bond, at the time of issuing the commission, was in the nature of unliquidated damages. The bond could not be said to constitute a debt, being merely creative of a liability; for the condition is, to pay all such costs and charges as the obligee may be put to; which is clearly a mere contract to pay unliquidated damages,—not a sum fixed and determinate, but what a jury shall find to be due. Can this then be said to be a debt, *eo nomine*? And if not, does not the whole tenor of the act of parliament exclude the proof of a mere liability? The term liability is used in several clauses of the act, but it is altogether excluded from the 56th; which forms a strong argument, that it was not the intention of the legislature to let in the proof of mere liabilities. The existence of the bond makes no difference in this case; for unless the *debt* was pre-existing, the bond itself will not create one. Put the common case of an action for an assault, in which a verdict giving damages is found after the commission,—that is universally admitted not to form a subject of proof; and yet the present case is precisely similar. If the argument for the petitioners was admitted to prevail, then it would follow, that bottomry and *respondentia*

(a) 2 Dea. & C. 251.

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bonds might have been proved under the 56th section of the statute. Why then did the legislature insert the 53d section, if the 56th was intended to apply to such cases as the present? If the petitioners seek to come in under the 56th section, it must first be established that their demand was at the date of the commission a debt certain, and also capable of valuation, in reference to the contingency. We contend that it was not certain, nor in any way capable of calculation; since the petitioners might never have been called upon, so as to sustain any damage within the intent of the condition of the bond. The case of *Ex parte The Lancaster Canal Company* (a) establishes the point, that there must be an actual debt existing, in order to constitute the contingency provided for by section 56. A bond does not of itself constitute a debt in bankruptcy, until it is forfeited by the condition being broken; and in this case, the demand sounds merely in unliquidated damages, which are incapable of proof. If there is no right of proof, therefore, there can be none to have a claim entered. And even allowing, that the damages found by the verdict render the claim in this case a debt ascertained, yet that admission will not assist the argument of the petitioners; for the bond is to indemnify against "all loss, costs, charges, damages, and expenses;" and here the damages only are ascertained; so that at any rate the costs, charges, and expenses cannot be proved. *Taylor v. Young* (b), and *Ex parte Thompson* (c), were also relied on.

Mr. Swanston, in reply. The whole question here

(a) 1 Mont. 44. (b) 3 B. & Ald. 529. (c) 2 Dea. & Chit. 126.

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is, whether the bankrupt had, at the issuing of the commission, contracted a debt, payable on a future contingency. It is clear, there was a liability contracted, and also a contract for the payment of money, upon the happening of a certain event. It cannot be denied, that the bond was conditioned to pay a sum of money, either on a contingency, or absolutely. If the former, it is provable under the act; if the latter, it was provable without the help of the statute. It is however insisted, that this claim is in the nature of unliquidated damages, and therefore that it cannot be proved. Yet it is difficult to discover how this is more in the nature of unliquidated damages, than all cases of guarantee and indemnity. In *Ex parte Myers* (a) the demand was as much unliquidated damages, as that in the present case; and yet the Court decided in favour of its being admitted for proof. To entitle a party to proof under the 56th section, there must, no doubt, be a debt contracted; and therefore it is admitted that the section does not apply, where there is an absence of any thing in the shape of contract. Consequently, the case put by the other side of a verdict in an action of assault, has no bearing upon the present question. Here there was not only a debt incurred, but also a contract by virtue of the bond. With respect to the argument, that as some claims similar to the present, such as bottomry and *respondentia* bonds, are specially provided for by the act, this case must be therefore necessarily excluded,—that seems a very unreasonable inference against the present claim. Are we, because there are superfluous sections in an act of parliament, therefore to mistify the plain construction of another

(a) 2 Dea. & Chit. 251.

independent section, which is perfectly intelligible in itself. There is nothing inconsistent in the whole act taken together; and the redundancy of expression in the present instance amounts to nothing more, than a superabundance of caution in the legislature. Upon the whole, it is submitted that the petitioners are entitled now to enter a claim for the 1000%.; and to convert it into a proof, as soon as they have paid the amount of the damages and costs to which they are already liable.

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ERSKINE, C. J.—It is quite clear, from the statement in the petition itself, and from the facts which are admitted, that the Court cannot go the full length of the prayer. We cannot allow the petitioners to prove for the amount of any damages and costs; for at present it does not appear, that any damage has been actually sustained, the petitioners not having yet paid any thing in consequence of the verdict; nor if they had, ought we to allow them to prove, unless that fact appeared upon the face of the petition. As the question, moreover, is raised merely for the sheriff's indemnity, we should do wrong to direct *proof* for the 1000%, when the sheriff may probably not incur damage to that amount; since the co-obligor of the bond, being solvent, may fully indemnify the sheriff. But as the damage is already inchoate, it is fair, that we should give a proper protection to the sheriff, by directing a fund to be retained sufficient to answer the claim, until it is capable of being converted into a proof. But it is insisted by the respondents, that inasmuch as the petitioners could not prove, even if they had paid

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this demand, and were actually out of pocket to that extent, it would be superfluous to allow a claim to be entered. If the respondents be right in their first position, it is clear that their argument must go to that extent. I confess, that my mind is not fully made up, whether the petitioners could prove, if the damage had actually been sustained by them. But my impression is, that they could. It is objected, however, that no debt was contracted in this case before the act of bankruptcy,—and that it is not a *debt*, but a mere liability. But looking at it, as if the amount of the verdict were actually paid,—and I think it would have been sufficient if it had even been tendered,—and putting bankruptcy also entirely out of the question, the demand would, in my mind, be in every sense a *debt*; and the sheriff could immediately bring an action of debt, and obtain a judgment for the penalty, *quasi debt*. Is it not a debt relating back to the execution of the bond, as soon as the judgment is obtained? That it is, however, a debt, at the present moment, is beyond a doubt; and therefore the question arises, when did it become a debt? Was it at the time the bond was executed, or when the condition was broken which worked the forfeiture of the bond? If the latter, it was, no doubt, not a debt at the date and suing forth of the commission; but if it accrued under a prior contract by virtue of the bond, a debt might then arise, to be paid at some future period, within the meaning of the statute, entitling the petitioners to prove. This, however, will be a subject for our consideration, when the event of actual loss or damage to the petitioners shall have occurred. In the present stage of the case, it is suffi-

cient, if we give the petitioners leave to enter a claim for the 1000*l.*, and direct the assignees to reserve a sufficient fund to cover the dividends, that accrue upon that amount.

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Sir J. CROSS.—It is very desirable, in any case of this nature,—an appeal from a Subdivision Court, rejecting a proof,—that the petition of appeal should state the grounds, upon which the judgment of that Court was founded. But in this case, it is particularly desirable to be accurately informed upon that point, since it is admitted that, in form, the judgment of that Court was perfectly correct; inasmuch as the damage had not been actually sustained.

Upon the merits of this petition, it is suggested by the respondents, that we ought not to allow a claim to be entered, unless the Court is in favour of the petitioners upon the main question, viz., whether or not they can ultimately prove the amount of their demand. That question is one of some doubt, to which I have not yet turned my attention. But inasmuch as we might be doing manifest injustice, if, during the pendency of that question, we were to allow a final dividend to be made, without providing a fund to satisfy the demand of the petitioners, in case they shall establish their right to prove,—I therefore agree in what has fallen from his Honor, the Chief Judge, that we ought to admit them, under the present circumstances of the case, to a claim on the proceedings.

Sir G. ROSE.—I am far from assenting to the argument of the respondents, that the claim in this case is of such a nature, that by no person, and under no

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circumstances, it can be ripened into a proof. If the obligor had been solvent, would not the obligee have a clear right to sue upon the bond? Does not this bond, therefore, in some way affect the bankrupt's assets? Suppose, also, that this was the common case of the administration of assets under a will, and bankruptcy were out of the question,—would the executor of Mr. *Fox* be justified in paying legatees, with this bond hanging over his head? Besides, the bond in this case is, in strictness of law, absolute; and the defeasance does not amount to a covenant rendering the bond contingent. In the early stage of the argument I took occasion to propose the course, which the Court has now adopted, in order to wait the result of any proceedings that may be taken, with reference to this claim, against the co-obligor of the bond. The Court certainly would not in any case admit a claim to be entered, unless it saw a probability of its being ultimately ripened into a proof: but in this case I conceive every such probability to exist. Although the argument has proceeded upon this being a mere bond of indemnity, yet I do not think that this is the ordinary case of an indemnity bond. For, looking at the state of the circumstances, we find the sheriff having actually given up the property of goods legally seized by him to the obligors; who have therefore received a good and substantial consideration for entering into the bond. And it is difficult to say, whether the sheriff would, or would not, have a right to prove for the value of these goods, if not for the costs he has been put to, independently of any claim he has by virtue of the bond. My present impression is, that the petitioners will be eventually entitled to prove the amount of their present

claim; but the order proposed will reach the justice of the case, in the existing state of circumstances.

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MARSHALL
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The order was, that the petitioners should be at liberty to go in under the fiat, and tender and make a claim for the sum of 1000*l.*, and that the Commissioner should receive and admit such claim accordingly, and that a dividend or dividends should be reserved on such claim, *pari passu*, with the rest of the creditors; and the consideration of costs and further directions to be reserved.

Ex parte GEORGE VERNON JACKSON.—In the matter of GEORGE VERNON JACKSON.

Southampton
Buildings,
March 5, 14,
& 15.

THE bankrupt in this case petitioned to annul the fiat, upon the ground that he had never committed an act of bankruptcy. The fiat was issued against him on the 18th January 1833, on the petition of *Anthony King Newman*; and, upon the petitioner being adjudged a bankrupt, he applied to Mr. Commissioner *Williams* for a copy of the deposition as to the act of bankruptcy, but was unable to obtain it. The petitioner stated, that one *John Stowers*, who was only nineteen years of age, and an apprentice to one *Robert*

Where the bankrupt, after the choice of assignees, petitions to reverse the adjudication under the 17th section of the 1 & 2 W. 4. c. 56., the assignees are not prevented from adducing further evidence to establish the act of bankruptcy, upon which the adjudication of the Commissioner proceeded.

On the hearing of such a petition, the bankrupt is entitled to have copies of the depositions; to enable him fairly to dispute the bankruptcy.

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Greenlaw, was examined for the purpose of proving that the petitioner had left his house, under circumstances which amounted to an act of bankruptcy. The petitioner admitted, that his furniture having been seized in execution, he was obliged to go the house of Mr. *Hall*, No. 9, *Princes Place, Kennington Cross*; and that he left directions, as stated by *Stowers* in his deposition, that all letters and parcels should be sent to the house of Mr. *Greenlaw*. But the petitioner alleged, that when *Stowers* was required to depose that the petitioner had absconded to avoid his creditors, he objected to do so; upon which, *Edward Starling*, the solicitor to the fiat, told him that it was no harm, as it was only his belief; and on this assurance *Stowers* was induced to make the deposition.

The petitioner therefore prayed, that the adjudication might be reversed, and the fiat rescinded; that the petitioner might be permitted to have a copy of the deposition to the act of bankruptcy; and that the petitioning creditor might pay the costs.

Mr. *Montagu*, and Mr. *Bethell*, in support of the petition, made a preliminary application for copies of all the depositions, on which the adjudication of bankruptcy was founded; alleging, that the bankrupt could not otherwise proceed to the hearing of the petition. The petition in this case being under the provisions of the 1 & 2 Will. 4. c. 58. s. 17., which declare that if the adjudication of the Commissioner shall not be set aside by the Court of Review on the bankrupt's petition, the adjudication shall in all cases "be conclusive evidence, that the party was, or was not, a bankrupt at the date of such adjudication," it is but reasonable,

that he should be entitled to see the evidence on which he has been made a bankrupt.

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Mr. *Swanston*, who appeared for the petitioning creditor and the assignees, opposed the application; contending, that it was contrary to the general rule in bankruptcy, which prevented the bankrupt from looking into the proceedings, for the purpose of upsetting the commission.

Sir J. CROSS.—There is no general rule on the subject. The Court must be guided by circumstances.

ERSKINE, C. J.—This Court will never affirm an adjudication of bankruptcy, without giving an opportunity to the bankrupt, if he requires it, of looking into the depositions, and cross-examining the witnesses produced before the Commissioner. The bankrupt therefore is entitled to have copies of the depositions, to enable him fairly to dispute the bankruptcy upon this petition; but he must undertake not to bring an action, and he must also engage to comply with the order of the Court.

The petition came on for hearing this day, to which it had stood over, to enable the bankrupt to obtain the required copies of the depositions. From these it appeared, that *Stowers* stated, “that he knew the bankrupt, from the fact of his dealing with the deponent’s master, who lived next door but one. That the deponent saw some of the bankrupt’s goods removed, about dusk on Saturday evening, 22d December 1832, and that some more were removed on the morning of the

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26th. That four or five days after, a bill was affixed on the shutter of the bankrupt's house, that letters and messages for the bankrupt would be taken in by deponent's master, but the deponent did not know where the bankrupt was to be found; and that a man called occasionally on the deponent's master for such letters as were left for the bankrupt. That the deponent had not seen the bankrupt in the neighbourhood since about a week before Christmas; and that he believed the bankrupt had absconded from his creditors.

There were two other depositions, but they did not carry the case any further than mere belief. The subsequent examination of the bankrupt, and the affidavits filed in support of, and in opposition to, the petition, rather tended to show that the act of bankruptcy by absconding had been committed.

Mr. *Swanston*, and Mr. *J. Russell*, on behalf of the assignees, and the petitioning creditor, proposed to adduce new evidence of the same act of bankruptcy, in support of the fiat now sought to be annulled.

Mr. *Montagu*, and Mr. *Bethell*, for the bankrupt. It was formerly not an uncommon practice to adjudicate a bankruptcy upon very loose testimony,—upon the belief of a party, merely, as in the present case, without stating the grounds upon which that belief was founded; but of late years, since the general amelioration of the bankrupt laws, it has become the established practice to require more satisfactory evidence. The danger of the former laxity in this respect, is alluded to by Lord *Eldon*, in *Ex parte Herbert* (a), and it was declared by

(a) 2 Ves. & B. 399.

been tried as aforesaid, it shall and may be lawful for the Lord Chancellor, on petition to him, to be presented within one calendar month after such verdict, and upon notice thereof to the bankrupt, upon special circumstances to be submitted to the said Lord Chancellor, to order that another fiat do issue at the instance of any other than the former petitioning creditor against the said bankrupt, and that such fiat shall and may be supported by any debt, trading, or act of bankruptcy, or other than those given in evidence on the trial of such issue."

The intention of the 17th section is, therefore, to give the bankrupt a right to try the validity of the *adjudication*, in order to prevent a decision against the bankrupt behind his back; and we contend, that the investigation must be solely confined to the validity of that *adjudication*,—that no new case can be made out against the bankrupt,—and that if decided to be bad, no fresh evidence can be entered into.

In the case of *Ex parte Heath* (a), which was heard in this Court, a similar question arose; but the matter went off on another ground. In *Ex parte Palmer* (b), the distinction between the right given under the 17th section, and the general right of the bankrupt to supersede, was fully established by this Court. In that case, the Court decided that a bankrupt is not prevented by the 17th section from applying to supersede, although two months have elapsed from the date of the adjudication. It is there said, by *Erskine* C. J. "There are no words in the 17th section which limit the general authority given to the Court by the 2d section. The

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(a) 1 Mont. & B. 116; *vide* note there.

(b) 1 Dea. & Ch. 345; S. C. 1 Mont. 497.

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in any other part of Europe; or within one year from the date aforesaid, if then residing elsewhere, or within such other time as the said Court shall allow, not exceeding one year, to be computed from the date aforesaid;) such Court of Review shall proceed to hear and decide on the said petition, or at the option of the said bankrupt, and on his finding such security for costs (if the said Court shall think fit to require any security) as by the said Court shall be approved, shall direct an issue to try any matter of fact, affecting the validity of such adjudication, by a jury to be duly impanelled and sworn for that purpose, before the chief judge, or any one or more of the other judges of the Court of Bankruptcy; and if the verdict on such issue shall not be set aside, on application made to the said Court of Review, within one month after the said trial, or if the adjudication of the Commissioner shall not be set aside by the said Court of Review, on the petition aforesaid, such verdict, or such adjudication of the said Commissioner, shall in all cases, as against the said bankrupt, and also as against the petitioning creditor, and as against any assignee to be chosen of any such bankrupt's estate and effects, and as against all persons claiming under the said assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was, or was not, a bankrupt at the date of such adjudication, any other act, debt, or trading, than the act, debt, or trading proved at such trial, notwithstanding." An appeal is reserved from the decision of the Court of Review to the Lord Chancellor, upon matter of law or equity, or on the refusal or admission of evidence only. Then the 18th section provides, "that after any such issue shall have

been tried as aforesaid, it shall and may be lawful for the Lord Chancellor, on petition to him, to be presented within one calendar month after such verdict, and upon notice thereof to the bankrupt, upon special circumstances to be submitted to the said Lord Chancellor, to order that another fiat do issue at the instance of any other than the former petitioning creditor against the said bankrupt, and that such fiat shall and may be supported by any debt, trading, or act of bankruptcy, or other than those given in evidence on the trial of such issue."

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intent of the 17th section was not to curtail the jurisdiction previously given, but to confer on the bankrupt a privilege which he did not possess." "This indulgence seems to me not to interfere with the general jurisdiction of the Court to supersede a commission whenever it shall think proper." And Sir G. Rose makes use also of similar observations. The 17th section is, therefore, intended to suppress the evil, and advance the remedy; and the evil, in this instance, is the adjudication, which the bankrupt had formerly no power to scrutinize. He comes then, not to annul the fiat, but to reverse the *adjudication*. The adjudication, therefore, and the evidence advanced in support of it at the time it took place, are the only things to be looked to under this petition. [Sir J. Cross. You also pray in your petition to rescind the fiat.] That, we say, is mere surplusage in the petition, and ought not to affect our rights. [Sir J. Cross. I understand you then to contend, that although the party might have, in fact, committed an act of bankruptcy on the day of the adjudication, yet if the adjudication was grounded on insufficient evidence, it is incompetent to go into other evidence *now*, to support the bankruptcy.] That is our argument. The only term adopted by the act in the first part of the section, is the "*adjudication*;" and the petition presented against it is in the nature of an appeal, from the Court below.

Now let us look to the nature of this Court, as a Court of Appeal from the decision of the Commissioner. It has, by the act, vast powers, altogether different from the Court below; and the latter has also powers and duties, which are not delegated to this Court. It is not the province of this Court to adjudge a man a

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bankrupt, that being the duty entrusted to the Commissioners. Indeed, before this Court was established, neither the Lord Chancellor, nor the Vice-Chancellor, had power to adjudicate the bankruptcy; and the Court is invested only with the same general powers, as the Lord Chancellor formerly possessed in matters of bankruptcy. If it were competent to receive new evidence in this case, a monstrous absurdity would follow; for while the Court would annul, as in this case it must, the finding of the Commissioner on the ground of the evidence not bearing out his conclusion, it would at the same time, by the admission of fresh evidence in support of the adjudication, exercise an original, as well as an appellate jurisdiction, in regard to the adjudication of bankruptcy. In *Ex parte Perrin* (a), decided by Lord Eldon, an application was made for an order on the Commissioners to proceed to declare the party a bankrupt, the Commissioners having doubted whether there was an act of bankruptcy. In support of the application *Ex parte Preston* (b) was cited, where Lord Apsley had made such an order; and the counsel were proceeding to detail the evidence produced before the Commissioners, when they were stopped by the Lord Chancellor, who declared his clear opinion to be, that the Commissioners were the only tribunal to whom the legislature had entrusted the declaration of bankruptcy,—that he had no authority to compel them to make such a declaration,—and that his interference must be limited to ordering them to proceed in their judgment.

The province of a Court of Appeal is simply to review the sentence of the Court below, and to de-

(a) Buck, 510.
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(b) Cited from Green, 1 Co. B. L. 32.
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termine if the judgment was rightly pronounced. In an appeal from a Master in Chancery, which is in the shape of exceptions to his report, the party is confined to those objections, and to those only, which were made before the Master (a). Neither can new evidence be adduced on an appeal from the Master of the Rolls, or the Vice-Chancellor, to the Lord Chancellor,—nor from any Court to the House of Lords. And indeed, on the hearing of all appeals, this principle universally prevails,—that no evidence can be received which was not laid before the Court below; nor can any evidence which was received there be objected to, unless the objection to the evidence is assigned as one of the grounds of the appeal. But, to go still further,—where it does not appear by the Registrar's minutes, that any evidence was read at the hearing of the cause, the Court of Appeal will not, upon a subsequent application, make the usual order that the evidence should be entered as read (b); thereby showing, how strongly the Courts guard against any infringement of the principle that we are contending for. [Sir J. Cross. I take the adjudication to be a mere finding of a Commissioner; and it strikes me, as being altogether different from a judgment; for before pronouncing a judgment both parties are heard. Here, the proceeding was *ex parte*; and the question for us to decide is, whether such a state of circumstances existed at the time of the adjudication, as would have warranted the Commissioner in declaring this party a bankrupt.] We say, the Court ought not to go so

(a) See *Davis v. Davis*, 2 Atk. 21.

(b) See *Eden v. Earl Butte*, 1 Bro. P. C. 465. Toml. edit.

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far ; they have the finding, and the ground-work of that finding before them, and must confine themselves to the consideration, whether that ground-work was sufficient. The seventeenth section does not go the length of saying, that the Court shall decide upon the case made out, but confines itself to a hearing and decision “ *on the said petition.*” And the act proceeds to say, that “ if the *adjudication* of the Commissioner shall not be set aside,” then, so and so ; which clearly shows that the Court, in its reviewing power, is simply to decide, whether or not *the adjudication* is valid. [Sir J. Cross. There is nothing in the act, that allows the production of fresh evidence in the case of an issue, more than on a petition. And yet if an issue had been called for, would it not be manifestly in the power of the judge who tried the issue, to reject, as evidence, the depositions altogether, and to require entirely fresh evidence ? At least, a jury would not rest satisfied with the evidence of mere depositions alone, in any case.]

Mr. Swanston, and Mr. J. Russell, for the petitioning creditor and the assignees. This petition is presented under an entire new right, which bankrupts have acquired from the seventeenth section of the Bankruptcy Court Act. That section points out two modes, by which they may avail themselves of the right : the one by petition,—the other by an issue to be tried by a jury,—at the option of the bankrupt. In the present case, the bankrupt has chosen the former mode ; and, in support of his petition, he has filed and read affidavits contradicting in set terms the truth of the depositions, on which the adjudication appears to be

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founded. Now, if the *argumentum ad hominem* is ever worth any thing, it is conclusively in our favour in the present instance; for the bankrupt, in availing himself of those affidavits, must evidently have contemplated, and indeed has virtually admitted, that the Court would not, and need not, confine itself to the mere depositions taken by the Commissioner; and after this admission, it is manifest, that the respondents have liberty to answer those affidavits and to produce further evidence. And, indeed, from the very form of the petition, the bankrupt has invited new evidence; for he therein denies that he *ever committed any act of bankruptcy*.

For the sake of the argument, we are ready to admit, that the mere deposition in this case is not sufficient to support the adjudication. The only question then, is, are we not at liberty to adduce new evidence of the same act of bankruptcy? There is nothing in the act of parliament, that shows it was the intention of the legislature to disturb the rules of evidence that have been long established, on the hearing of petitions; and unless that intention is distinctly expressed, we are not to draw any inference that the statute meant to alter them,—more especially, as the clause that bears upon this question is drawn with very great attention to detail. But there is nothing to infer, that a petition presented under the seventeenth section is to be heard differently from a petition in any other matter, viz. on affidavits filed on both sides. We do not in this case seek to establish another act of bankruptcy; but are only endeavouring to support the same act, upon additional evidence.

In reference to the alleged injustice of an adjudica-

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tion being made behind the bankrupt's back,—the legislature has for years upheld that system of declaring a man a bankrupt; and although many wise persons may have cavilled at it, yet it cannot have been so long adhered to, merely by accident, or from ignorance of its effects. However, if the principle be bad, yet the bankrupt has now an ample remedy provided for him in the subsequent stages of his bankruptcy. And even admitting the principle to be bad, still it would be a contradiction to all justice and common sense, to hold that if the identical deposition on which the adjudication is grounded be faulty, all other evidence is to be excluded in support of it. This would be restoring the practice in bankruptcy to its former resemblance to criminal proceedings, and would be introducing into a Court of Equity all the technical objections that may be taken to a criminal indictment. Surely, the main question to be now decided in this Court, the proceedings of which are regulated by equitable principles, is, not whether the Commissioner was in error, but whether the party was at that moment subject to the bankrupt laws, or not.

Here the bankrupt has chosen his remedy by petition; but had he chosen that of an issue, is it to be contended for one moment, that new evidence might not have been adduced to prove the act of bankruptcy? The object is the same in both modes of trying the adjudication, and if new evidence is receivable in the one proceeding, it must be equally admissible in the other. The adjudication by the Commissioner is not necessarily founded merely on the facts stated in the depositions. Other evidence might have been offered to him; but being satisfied with the fact, that the particular act of bankruptcy had been committed, he might

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not have required other evidence to be taken down formally in the deposition. To support this finding then, we are entitled to have recourse to other evidence. Before the 6 Geo. 4. c. 16. a new act of bankruptcy might, under a petition to supersede, have been brought forward to support the commission; and here we only seek to use fresh evidence of the same act of bankruptcy. The bankrupt has filed affidavits in support of his petition,—we have answered them,—and he has replied to them; this is the ordinary mode in which petitions in bankruptcy have been accustomed to be heard, and the only way in which the present one ought to be determined.

Mr. *Montagu*, in reply. This being an appeal from the Commissioner's judgment, or finding, call it what you will, the bankrupt has a right to stand exactly in the situation he stood in, at the time of the adjudication, and the same as if he had been then present in the room. The Court of Review is not only so constituted by the act, but is, in its very name, a Court of Appeal; and on all appeals no new evidence can be brought forward. In this case, the evidence of the adjudication is filed with the proceedings, and by that evidence, and that alone, the adjudication must stand, or fall. This is not a petition to supersede the fiat, in which case the Court will exercise a discretion of substituting a new debt, a new trading, or a new act of bankruptcy,—but simply a petition to reverse the adjudication. A petition presented, too, in the words of the act, *to try the "validity of the adjudication."* What establishes the validity, or invalidity, of *the adjudication*, but the evidence on which it was made? If that evidence is insufficient, the adjudication is wrong. The question to be tried on this petition is,

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therefore, whether the adjudication is rightly founded,—not whether the party had at that time committed an act of bankruptcy. In reversing the adjudication, no very general hardship will arise; for any other of the creditors may within a certain time take out a new fiat. They cannot therefore be injured. The only sufferer will be the petitioning creditor, upon whom the whole costs of the proceeding will fall. But he merits his punishment for his error.

If the Court adopts any new evidence to support the act of bankruptcy, it will be saying, in effect, “we find the adjudication wrong, but we adjudge the party a bankrupt;” to do which the Court has no jurisdiction.

ERSKINE, C. J.—In the outset of my judgment upon this case, I must express my regret, that I differ at present in opinion with my learned colleagues. The question raised is one of grave importance, both as to the establishment of the practice of this Court in similar cases, and as regards the interests not only of bankrupts, but of the public at large. And I certainly lament, that the words of the 17th section of the 1 & 2 Will. 4. c. 56. are not so clear, as to allow my mind to come at once to a decisive conclusion; my difficulty being, whether we ought in this case to admit other evidence than the mere depositions. Before the passing of that statute, in all cases of petitions to supersede a commission, (except indeed on a composition contract under the 6 Geo. 4. c. 16. s. 133 and 134.,) it was in the discretion of the Lord Chancellor, whether he would supersede or not; the superseding of the commission, of course, including the reversal of the adjudication.

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This Court would also have had a similar power, if it were not for certain words in the 1 & 2 *Will.* 4. c. 56. But the 17th section of that statute renders it imperative on the Court, *to hear and determine the matter upon the petition of the bankrupt*; from which I infer, that it is imperative on the Court to reverse the adjudication, if there is not sufficient to support it appearing on the proceedings. The first branch of the section says, the Court shall “proceed to hear and decide on the said petition.” If it had stopped here, I should have thought that the legislature intended, that we should determine the question, whether the adjudication was founded on sufficient evidence or not, on the depositions alone. There can be no doubt, that the bankrupt’s interests were in the view of the legislature, when this section was introduced; and that it was intended he should have the advantage of bringing forward his case before the Court of Review, on the instant. But the clause, after enabling the Court to grant an issue, goes on to say, “if the verdict on such issue, or if the adjudication of the Commissioner shall not be set aside by the said Court of Review on the petition aforesaid, such verdict, or such adjudication of the said Commissioner, shall in all cases, as against the said bankrupt &c., be conclusive evidence that the party was, or was not, a bankrupt at the date of such adjudication.” Now, if those words are intended to apply to the earlier branch of the section, the adjudication is to be considered final as against the bankrupt, in the event of our not reversing the adjudication. I should then be inclined to think, that it was intended that we ought to go into all the circumstances of the case, and admit new evidence

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as well as the old, either for or against the adjudication. But regarding this clause as intended for the bankrupt's benefit, I am at a loss to see what benefit he can derive from it, if the second part is to be construed to control the first; for it only makes the adjudication final against the bankrupt, in the event of an adverse decision on his petition for the reversal of it; while after a verdict even in his favour on the issue, it is not final; for the Lord Chancellor, under the 18th section, has the power to grant a new fiat "after any issue shall have been tried;" but he is not declared to have any such power, when the adjudication is reversed on *petition*; and the 17th section contains nothing expressly, or by inference, that makes the decision upon the petition final, if in *favour* of the bankrupt. There is, therefore, no reciprocity in the proceedings specified in the 17th section, for if the matter is decided against the bankrupt, on petition, it is final; and not final, if decided in his favour.

It is from this peculiar wording of the 17th section, that great doubts arise in my mind on the question before us; but I am at present inclined to think, that in order to give effect to the intent of the legislature that the bankrupt should be benefited by this provision, we ought to allow this objection, and confine the evidence in support of the adjudication to what appears on the depositions; and therefore not being satisfied with that evidence, I think the petition ought to be granted. I have not yet, however, formed such a decisive opinion in my own mind, as not to be open to conviction that it is an erroneous one; nor shall I be satisfied with the conclusion I have already come to, until I have heard the reasoning of my learned coadjutors.

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Sir J. CROSS.—I do not think it necessary that we should be confined solely and exclusively to the provisions of this act of parliament, in pronouncing our judgment on the present question; which I regard rather as a matter of fact, than one of law. The 17th section of the statute that has been referred to establishes, for the first time, a particular remedy for the bankrupt, in case he shall dispute the adjudication,—namely, by enabling him to seek a reversal of the adjudication by petition: but there is nothing in the act which points out to us any peculiar mode, in which we shall proceed to hear and determine the petition. If the legislature had intended that we should on this occasion vary the usual course on the hearing of petitions, I should conceive it would, in creating this remedy for the first time, have expressed its intention clearly and unequivocally: but there is nothing said upon that subject,—nothing to restrain us from the ordinary course of proceeding; and therefore the conclusion, in my mind, is, that the general practice of the Court is to be observed, and that we are bound to hear this petition as we should any other.

Now in this case the bankrupt, in exercising the option given him by the 17th section, has elected to present a petition to reverse the adjudication. What is the language of the adjudication? “I *A. B.* esq. a Commissioner &c., upon good proof on oath before me this day taken, do find” &c. This is the operating part of it; for I regard the latter part of the document, “and I do therefore declare and *adjudge* him bankrupt accordingly,” as mere surplusage. There is nothing in the memorandum of adjudication, showing upon what evidence in particular the Commissioner “finds” the

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party a bankrupt. To reason from analogy,—a magistrate, in a case of summary conviction, must have some testimony before him to justify him in issuing a warrant, and all the subsequent proceedings are grounded on the evidence taken before him at the time of issuing the warrant; but can it be contended, that the conviction is to rest solely on that evidence? And yet that case is precisely analogous to the present. The sole question here really is, had any and what act of bankruptcy been committed by the bankrupt at the time of the adjudication? Before this new remedy was given to the bankrupt, he must have carried his case before a jury: *there* he might have adduced any other evidence to contradict the adjudication, as might also the assignees in support of it; for the depositions alone would not have been received as sufficient. Then, what is there to restrain this Court from adopting a similar course in this proceeding, the real question being, whether the adjudication was right, or not, in point of fact? The bankrupt insists, that he may bring forward any additional affidavits to deny or explain the depositions, and he does so; but he contends that the other side have no such right, but must stand or fall by the depositions. This, however, seems to me to be a proposition both contrary to reason, and absurd in principle.

But then it is said, that this clause of the statute can produce no benefit to the bankrupt, if new evidence is admitted against him. Is it then to be supposed, that the legislature intended that the fiat should be annulled on a mere technical objection, and that the bankrupt was to be so far benefited, that if he could find the slightest flaw in the depositions, he might reverse the adjudication;—

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may, more, if it happened that the principal witness in support of the fiat was a creditor, that he should upset the whole proceedings and laugh at his creditors in safety? Certainly not. The benefit intended by the statute was this,—namely, to enable the bankrupt, without any delay, to come to this Court and contest the bankruptcy on petition, with a saving of the time, expense, and trouble that was attendant on the old mode of proceeding by an action at law. Looking at the matter in an equitable point of view, the bankrupt is not injured by the admission of fresh evidence; for if he has not in reality committed an act of bankruptcy, the new evidence will not injure him: and if it establishes that he is a proper subject for a fiat, it is right and just that he should be declared a bankrupt. This mode of proceeding is also much more beneficial to the bankrupt in this respect: he knows at once the evidence that will be offered against him, on the hearing of his petition,—while, on a trial at law, he was often turned round upon a point of evidence, of which he had no previous intimation.

Suppose it were to be decided, that no new evidence were admissible in a case like this, let us look at the hardship and injustice that would befall the petitioning creditor. The Commissioner, on arriving at a certain stage in the evidence, if he found it sufficient to satisfy *his* mind upon the fact, might stop all further testimony, which the parties might have been prepared to adduce in support of the act of bankruptcy; and then, because the deposition filed with the proceedings was insufficient, the petitioning creditor would have no remedy left him; for, besides being saddled with all the costs, he would never be able afterwards to take out another

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fiat. It is contended, that the bankrupt should stand here in precisely the same state, as he did at the time of the adjudication. But suppose he had had the assistance of counsel before the Commissioner, his counsel would have said, perhaps, that the evidence (which appears in this deposition) was not sufficient to establish an act of bankruptcy. The Commissioner would then have called upon the petitioning creditor to produce further evidence; and that is the whole course of proceeding proposed to be pursued here this day.

From the absence of any motive assigned by the bankrupt in his affidavits before us on this petition, for absenting himself from his dwelling-house, I am induced to think, that the Commissioner came, some how or other, to a very just and right conclusion. And I repeat what I have before observed, that the main question for us now to determine is, whether the petitioner was a bankrupt at the date of the fiat.

As there is no rule of law, to restrain the usual course of proceeding on petitions from being adopted in this case, I think, that it is open to both parties to produce what evidence they can, either in support of, or in opposition to, this petition.

Sir G. ROSE.—Before the 1 & 2 Will. 4. c. 56. it was competent to either party, on a petition to supersede, to advance other evidence than that appearing on the face of the proceedings; and the question is, how far that power is affected by the new mode of proceeding introduced by the 17th section of this statute. It is certainly much to be regretted that, from the perplexity of the language of this section, we are left to construe its meaning from the intention to be

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collected from the whole act. In order to see, whether, in the mode adopted by the bankrupt under this section to dispute the adjudication, we are to deprive the other side of the benefit of the usual course of proceeding on petitions in bankruptcy, we must look at the general intent of the statute, and then try to discover, whether the general intent is controlled by any particular intent,—and whether, if there be any particular intent, that particular intent is outweighed by the general intention.

Now the main object of the bankrupt law is distribution amongst creditors, and to provide a more easy and speedy mode of obtaining that object, are the avowed ends of the 1 & 2 Will. 4. c. 56. The 5 Geo. 2. c. 30. ss. 26 & 27., for the first time adopted the intervention of assignees, as officers in bankruptcy; and the mode of proceeding by caveat to prevent the issuing of a commission, was then a right enjoyed by the bankrupt. At that time, and until the 6 Geo. 4. c. 16. s. 6., there was also no limited time for issuing the commission after striking a docket; and the docket might be suspended over the head of the bankrupt for an indefinite period. The process of caveats, although still existing in analogous cases of lunacy, has long ceased in bankruptcy because the bankrupt under that system could, before a commission was actually issued, dispose of all his property, notwithstanding the docket (a). It appears to me, that the provision con-

(a) The last case reported upon the subject of caveats, appears to be that of *Ex parte Parsons*, 1 Atkyns, 72, A. D. 1746. There, the party who was sought to be made a bankrupt presented a petition, stating, that he never carried on trade, nor did he ever seek his livelihood by buying and selling &c.; and, being advised he was not liable to the bankrupt laws, he prayed

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tained in the 17th section might have been introduced, as a kind of compensation for the loss which the bankrupt had sustained, by the putting an end to caveats.

Had this petition been presented before the choice of assignees, some doubts would have arisen in my mind, as to what course we ought to have pursued; for, as between the petitioning creditor and the bankrupt, and the assignees and the bankrupt, the rights are totally different. As between the former parties, the bankrupt might, perhaps, have been permitted to rely on the objection, that the depositions were insufficient to support the adjudication, and to restrict the petitioning creditor from going into other evidence; as the deficiency in the proof of the requisites to support the fiat would have arisen from the petitioning creditor's own laches, and he only would have suffered. But, as between the bankrupt and the assignees, the case is altogether different. The assignees are perfect strangers to the adjudication, and ought to be permitted to avail themselves of any further evidence, which is necessary to support their title. But is the assignment to be displaced, and their title to be rendered bad, because the mere adjudication is tech-

that no commission of bankruptcy might be sealed against him, until he had had an opportunity of being heard by his counsel against the issuing thereof. The father of the petitioner had by his will directed his widow to carry on the business of a brewer for the petitioner, until he attained 21. The petitioner had then lately come of age, A. D. 1745. Lord *Hardwicke* said, "I ordered this attendance on the petition, because I do not approve of caveats against commissions of bankrupt, before they issue; there have been some few instances, but I hope this will be the last; because it will be a great inconvenience in general, as it will give an opportunity to persons, against whom the commission is to be taken out, to make away with their effects." And he ordered the commission to issue, and be prosecuted up to a certain point; and an action to be then tried, whether the petitioner was liable to the bankrupt laws.

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nically defective? Are they to be rendered subject to all the consequences of actions and indictments, because the Commissioners may have exercised an erroneous judgment? No such thing. The assignees were never liable to have their title cut down, in the same way as a petitioning creditor's title to the commission might be impeached. They have been in almost all cases allowed to substitute a complete new foundation for the commission; for, not being parties to the adjudication, they cannot be considered guilty of those laches, for which the petitioning creditor is oftentimes made to suffer.

We cannot err in adopting, in such a case as this, the *argumentum ab inconvenienti*; and, in this point of view, let us consider the innumerable frauds that might be practised, if we were to hold that no other evidence could be given of the act of bankruptcy, than what was contained in the depositions. Look at the effect of a friendly fiat of bankruptcy. All the bankrupt's estate might be frittered away, and diverted from its proper channel; and then the bankrupt might say, the fiat was founded on insufficient depositions, and therefore void; and yet, if the arguments of the petitioner in this case were to be adopted, all the creditors would be bound, and debarred from issuing any other commission.

The 17th and 18th sections are either intended in the nature of a *caveat*, for the purpose of giving the bankrupt the same kind of benefit, though a safer one, which he lost by the discontinuance of that proceeding; or they owe their origin to a confused notion of the legislature, that the Lord Chancellor, who could alone issue fiats, would also alone have the power to annul them.

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Looking then through the whole statute, both as to the general and particular intention, I can see nothing in it to alter the usual mode of proceeding on petitions in the present instance, more than in others,—nothing, in short, but a general transfer of the Lord Chancellor's power to this Court. The conclusion I have come to therefore is, that we ought to admit the further evidence that is offered to us, to prove the act of bankruptcy.

ERSKINE, C. J.—The opinion I have already expressed has been, I admit, much shaken by what has fallen from his Honor Sir *G. Rose*, in the distinction he has drawn (from the two modes of looking at this question) between the petitioning creditor and the bankrupt, on the one hand,—and the assignees and the bankrupt, on the other. I will, however, turn the matter over in my mind again, between this time and to-morrow morning, when I will mention the result of my final opinion.

ERSKINE, C. J.—I have maturely considered this difficult question; and I am now quite satisfied, that this petition is to be heard in the same manner as all others are heard, with respect to the admission or rejection of further evidence.

March 15.

The case then proceeded upon the additional evidence adduced in support of the act of bankruptcy; and the result was, that the adjudication was sustained. The petition was therefore dismissed; the costs of the assignees, and of the petitioning creditor, to come out of the bankrupt's estate.

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Westminster,
May 4 and 7.

Ex parte JEREMIAH CARTER and CHARLES WILLIAM HICK, Assignees, and PETER HARRIS ABBOTT, Official Assignee.—In the matter of **CHARLES BOLDERO, EDWARD GALE BOLDERO, Sir HENRY LUSHINGTON, Bart., and HENRY BOLDERO, Bankrupts.**

An assignee was removed and ordered to account. Pending that order, the new assignees petitioned for the taxation of the bill of the solicitors employed by the discharged assignee, and that they might be ordered to account for money, charged to have been improperly received by them with the privity of the former assignee: *Held*, that the petition was premature, during the pendency of the former order; but the Court retained it, under the circumstances, until the result of the pending account was known.

THIS was a petition of assignees to tax the solicitors' bill. The commission issued against the bankrupt in January 1812, and under it *Christopher Idle, Joseph Marryat, and William Timson*, were chosen assignees. Mr. *Idle* was discharged by an order of the Lord Chancellor in 1817, Mr. *Marryat* died in 1824, and Mr. *Timson* remained the sole assignee. In 1828 the petitioners were appointed assignees in conjunction with *Timson*; and by an order of this Court dated 2d March 1833, *Timson* was removed, and ordered to account, and had since fallen into insolvent circumstances, so that the petitioners now remained the sole assignees.

It appeared, that *Timson* in 1827 had appointed his private solicitors, Messrs. *Brooksbank and Farn*, (who were the main respondents to this petition,) to be the solicitors under the commission. The petition proceeded to state, that these solicitors had, with the privity of *Timson*, received part of the estate of the bankrupts, which they had never accounted for; and that they claimed a lien on it for monies due from *Timson* on his private account. That the petitioners were altogether ignorant of any bill having been delivered by the solicitors to *Timson*; but if there had been, the same had never been taxed. That if an account were now taken, a considerable balance would be found due from them to the estate. The petition then prayed, that the whole of the solicitors' bill of charges might be taxed,

and that they might account for all monies come to their hands.

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Mr. *Anderdon*, for the petitioners. The object of the petitioners is to be furnished with the accounts of Messrs. *Brooksbank* and *Farn*, in order that they may be enabled to come to a proper account with Mr. *Timson*. There is no affidavit showing positively that no account has ever been delivered; but both the petition and affidavit state the entire ignorance of the petitioners of that fact, and at the same time their belief, that none has ever been rendered. There is no counter affidavit, denying the reasonableness of this belief; and therefore it is apprehended the fact must be taken to be admitted.

Mr. *Swanston*, with whom was Mr. *Heathfield*, for the respondents. The order of the 2d March directed *Timson* to account for the bankrupt's estate; and if Mr. *Timson* has paid Messrs. *Brooksbank* and *Farn*, without previously taxing their bills, the payment cannot, of course, be allowed in his account with the present assignees, before he first procures the bill to be taxed; but as long as *Timson* is chargeable, Messrs. *Brooksbank* and *Farn* cannot be resorted to by the present assignees.

Sir G. *Rose*. The effect of that order of the 2d March is all that we can give to the petitioners, upon the present petition. What need then is there of this petition?

Mr. *Anderdon*. We charge, that the order has never been prosecuted, and that collusion exists between Mr. *Timson* and the solicitors. [Sir G. *Rose*. If Mr. *Timson* has improperly paid the bill, your only remedy seems to be against him, unless he is insolvent; in which case you

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might be entitled in equity to relief against these respondents.] We humbly submit, that we have a right to go against these respondents in the first instance. Even if they were merely solicitors of this Court, we should have that right (*a*). But as they were also solicitors under the commission, there can be no doubt on the subject; for in that capacity they are peculiarly under the superintendence of this Court. They cannot purchase the bankrupt's estate (*b*), as strangers could, and are also under other disabilities; being in fact as much under the control of the Court, as the assignees themselves are. Besides, the statute imperatively requires that every solicitor's bill under the commission shall be taxed (*c*); and who are the proper parties to obtain an order to that effect, but the existing assignees under the commission? It is said, that they must have their remedy in this case against the former assignee; but this Court, being a Court of Equity, will not put the assignees to so circuitous a mode of proceeding. [*Erskine*, C.J. What has been suggested is, might you not have done all you now seek under the old order?] As we now charge collusion to exist between the parties, it is clear, that if Mr. *Timson* had continued assignee, there could be no objection to the present application.

May 7. Mr. *Swanston*, in continuation of his argument for the respondents. There are no allegations in this petition as to the information and belief of the assignees, in regard to the truth of the statements therein contained; neither is there any affidavit directly in support

(*a*) See *Ex parte Hicks, re Smith, ante*, 573.

(*b*) See *Ex parte Farley, re Delves, post*, vol. 3; *Ex parte Bull, re Ditchman, post*, vol. 3.

(*c*) 6 G. 4. c. 16. §. 14.

of them. The pleadings in a cause are never suffered to be used in evidence, unless the allegations contained in them are verified upon oath. In the case of a bill in equity, if the answer be not read in support of the plaintiff's case, and no other evidence is adduced, the bill is at once dismissed. The same principle applies to this petition; for it would be a most dangerous precedent to entertain a petition of this description, without one tittle of evidence in support of it. [Sir *G. Rose*. There is a great difference between the situation of a common suitor, and an officer of the Court. From the peculiar jurisdiction which Courts have over their own officers, they will, upon the mere suggestion of improper or irregular conduct, call them to account.] Still the Court will as much protect an officer of the Court, as it will any other person. Where an assignee employs a solicitor in various matters in bankruptcy, and the solicitor receives different sums of money, perhaps in several commissions, it is not the solicitor's duty to see to the due application of the money, but he is discharged, if he pays it over to the assignee. If the assignee chooses to pay, even avowedly with the bankrupt's money, his own private debt to the solicitor, the latter is entitled to retain it; as he is not responsible to the bankrupt's creditors for the acts of the assignee. Neither is he bound to keep separate accounts. This is like the common case of the inability of a creditor of a testator's estate to sue a debtor to that estate, the sole right being against the executor.

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Mr. *Anderdon*, in reply, was stopped by the Court.

ERSKINE, C. J.—It is justly said, that this petition

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is premature, and perhaps irregular, during the pendency of the former order upon *Timson* to account. But I think the circumstances are altogether sufficient to entitle us to retain this petition, to abide the result of the account directed to be taken under the old order; which order the petitioners must of course be at liberty to prosecute.

Sir J. CROSS concurred.

Sir G. ROSE.—Sitting here as we do for the protection of the creditors of bankrupts, and having a complaint made to us against solicitors to the commission, as officers of the Court in this particular matter, we are not bound by those mere technical objections, that might be allowed to prevail in ordinary cases. We are here in a judicial, as well as ministerial, capacity; and our duty is to see to the protection of the bankrupt's estate. We cannot certainly at present make any order on this petition, nor until the result of the account pending be known. But I am far from thinking, that the petitioners did wrong in coming here upon this petition. For the former order does not seem to me to provide for bringing the parties again before the Court. Ordinarily, it is the habit of the assignees to employ a solicitor, and to pay him liberally; but it is as between the assignee and the estate, that the bill is taxed; and it is not of course to make the solicitor refund. If, as I have before observed, the assignee is insolvent, then indeed the estate may have some equity against the solicitor; and if the solicitor has any portion of the estate in his hands, I do not see how he can, in such a state of circumstances, resist the claim

of the *cestui que trusts*. But we do not decide that question at present.

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The original order of the 2d March 1833, was ordered to be prosecuted by the petitioners before the Deputy Registrar, with liberty to Messrs. *Brooksbank* and *Farn* to attend the inquiry. The Deputy Registrar to be at liberty to state special circumstances, at the request of either party. All further directions to be reserved, and the costs to abide the result of the account. The costs of Mr. *Timson* of this application to be allowed, but the payment of them to be reserved till the event of the account be known.



Ex parte HENRY HURLY and others.—In the matter of THOMAS GOULDING RAMSAY.

Westminster,
May 8.

THIS was an application, that the assignees might be at liberty to sell certain property of the bankrupt by private contract.

The Court will make no order, on a petition of the assignees to sell any portion of the bankrupt's property by private contract; it being a matter in which they must use their own discretion.

The COURT observed, that the assignees need not apply to the Court for an order to sell by private contract. They may, and must, use their own discretion. If the proceeding be provident, no order of the Court is necessary to justify it; and if improvident, the Court could not make an order exonerating the assignees

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—
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from the consequences of their improvidence. And they refused to make the order.

Mr. *Chandless* for the petitioners.

Mr. *E. Montagu*, for the respondents, who were willing to consent.

General Order.—22 May 1833.

SPECIAL CASE.

IT is ordered, that every special case of appeal from this Court, tendered for the approval of one of the judges, shall be left for that purpose at the office of the Registrar, signed by the counsel for the respective parties, or accompanied with a certificate from the counsel for the appellant, that there is in their judgment good cause for such appeal, and an affidavit that a copy of such case has been delivered to the solicitor for the other party, eight days prior to such tender thereof.

THOMAS ERSKINE, C. J.

J. CROSS, J.

G. ROSE, J.

Ex parte KEYS.—In the matter of **AUGUSTUS APPLE-**
GATH.

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Ex parte WESTON.—In the same matter.

Westminster,
May 25 & 29.

THE circumstances of this case are reported in a former stage of the proceedings (*a*). Under the order there stated to have been made by this Court, the Commissioner, Mr. *Fonblanque*, had pursued the examination of Mr. *Weston*, and re-examined the accounts of the assignees; and by a memorandum dated the 7th March 1833, the Commissioner found that the assignees, Messrs. *Weston* and *Bensley*, had “by themselves, or their solicitor (Mr. *Bostock*), received further sums on account of the estate of the said bankrupt, with which I have charged them; and that there is now a balance of 2879*l.* 18*s.* 6*d.* in the hands of the said assignees applicable to a dividend.” The assignees having refused to pay over the money, so found to be in their hands, to the official assignee, the first petition of *Ex parte Keys* was presented to confirm the order of the Commissioner; and the second petition, *Ex parte Weston*, was a cross petition filed to reverse such finding, and to bring on the general question for discussion, as to the liability of assignees for the defaults of their agent.

Although a commissioner has no power, under the 106th section of 6 G. 4. c. 16., to charge the assignees with monies, which but for their wilful default they might have received; yet, where he charged them with certain sums as received “by themselves, or their solicitors,” the Court referred it back to him to ascertain the amount which the assignees, or any person for them, had received, or which but for their wilful default might have been received.

Mr. *Swanston*, and Mr. *Anderdon*, appeared in support of the petition *Ex parte Keys*.

But Mr. *Montagu*, and Mr. *Bethell*, were first heard in support of the petition *Ex parte Weston*.—It is admitted, that there are cases in which assignees have

(*a*) *Vide ante*, p. 101.

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been held liable for the default of their agent. But the facts in those cases are sufficient to distinguish them from the present. Thus, in the matter of Lord *Litchfield* and another (a) it was held, that where assignees, *without consulting the body of creditors*, had employed *a person of little credit*, they were liable for the embezzlement of the agent. In this case, however, both those ingredients are wanting; for here the body of creditors had in fact appointed, or at least adopted, Mr. *Bostock* as their solicitor,—and Mr. *Bostock* was at that time in very good circumstances, and a person of high credit.

But in *Ex parte Belcher* and others (b),—which was a case where an assignee, after employing a broker to sell a quantity of tobacco, belonging to the bankrupt, allowed the money to remain ten days in the broker's hands, when he died insolvent,—the Court held the assignee not to be responsible. And on that occasion Lord *Hardwicke* used this strong expression, “If the assignee is chargeable in that case, no man in his senses would act as assignee under commissions of bankruptcy.” In *Raw and Cutten* (c), also, (where the whole of the law upon this subject is gone into,) it was held, that a provisional assignee was not liable for the default of an agent appointed with due care; and there Lord Chief Justice *Tindal* says (d) “The Court has laid down a rule, with regard to the transactions of assignees, and more so of trustees, so as not to strike a terror into mankind acting for the benefit of others, and not for their own.” In that case, the general body of creditors did not

(a) 1 Atk. 87. (b) 1 Ambl. 218; 1 Ld. Ken. 38, more fully reported.

(c) 9 Bing. 96.

(d) *Id.* p. 103.

sanction the appointment of the agent by the provisional assignee ; and yet, on the agent eventually appearing not to be a responsible person, the provisional assignee was discharged from liability. To make a different order in this case would be acting *strictissimo jure* ; since no one could doubt Mr. *Bostock's* character at the time of his appointment, and that appointment took place by the general body of creditors, and not singly by Mr. *Weston*,—who is now sought to be visited with Mr. *Bostock's* defaults. [Sir *G. Rose*. As I at present understand this case, an official assignee has been appointed, at whose instance all these proceedings against Mr. *Weston* are taking place. Now the suggestions which present themselves to my mind are, first, what right have the creditors to call for the payment of this sum of money to the hands of the official assignee?—secondly, what right has the official assignee to call for this payment from the general assignee? Here I think is the first difficulty; for the Commissioner has no power, under the statute, (a) to charge the assignees with what, but for their wilful default, they might have received ; his only power being, to examine the accounts,

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(a) 6 Geo. 4. c. 16. s. 106 ; which, after directing the Commissioner to appoint a meeting for auditing the accounts of the assignees, provides “ that the assignees at such meeting shall deliver upon oath a true statement in writing of all money received by them respectively, and when, and on what account, and how the same have been employed ; and the Commissioners shall examine such statement, and compare the receipts with the payments, and ascertain what balances have been from time to time in the hands of such assignees respectively, and shall inquire whether any sum appearing to be in their hands ought to be retained ; and it shall be lawful for the said Commissioners to examine the said assignees upon oath, touching the truth of such accounts, and in such accounts the said assignees shall be allowed to retain all such money as they shall have expended in suing out and prosecuting such commission, and all other just allowances.”

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and find the bare balance, and ascertain what is in the hands of the assignees.] Such is just the argument we were about to urge ; the authority of the Commissioners is merely to find what is in hand applicable to a dividend. [*Erskine*, C. J. In the case of *Raw v. Cutten*, the provisional assignee had in no way interfered ; he was a mere officer of the Court. Here, the assignees are in a different position, and Mr. *Bostock* is their agent. Sir *J. Cross*. The Commissioner has also found, that the money was actually received by the assignees, either personally, or by their agent ; and not merely, that the assignees might have received this money.] We say, the Commissioner was not justified in such a finding. He had no power to inquire as to any wilful default ; and in the absence of wilful default, the assignees are clearly not chargeable. The 20% per cent. clause (a) only renders an assignee liable for money retained by his co-assignee, with the knowledge of the party to be charged. [Sir *J. Cross*. If an assignee have part of the bankrupt's effects in his pocket, and is robbed,—which would be a loss, without his wilful default,—that would clearly excuse him from liability. If it be shown, as the Commissioner's certificate establishes, that the money was received by the assignees, by themselves, or their agent, the *onus* lies on them to show, that it has been lost without their wilful default.] There are two modes of calling to account individuals standing in fiduciary situations ; first, for what they have received ; and secondly, for what, but for their default, they might have received. In the second instance, you must show on the pleadings in a suit in

(a) Sec. 104.

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equity, that the party is a trustee, and next that there is a wilful default. If the master finds a default, where a case of that nature is not supported by the pleadings, a supplemental bill must be filed to bring the matter properly before the Court. Now, the 106th section of the 6 Geo. 4. c. 16. is the only one, by which the Commissioner in this case had any authority given him to act; and under that section he has no power whatever to find that assignees might have received money, save for their wilful default. But even granting that he had the power, we deny that *Bostock* was our agent. We say, he was the agent appointed by the creditors at a general meeting. The former Commissioners, also, by their certificate on holding the audit meeting, view *Bostock* in this light. The accounts of the assignees were passed, subject only to *Bostock's* account, not considering his account as necessary to the passing of those of the assignees. We contend, therefore, that there must at least be a reference of some kind to inquire, whether they might have received this money, but for their wilful default; and that they cannot be held liable in the present stage of these proceedings.

Mr. *Swanston*, and Mr. *Anderdon*, for the creditors. We have obtained the judgment of the Commissioner in our favour; and now we are entitled to ask that of the Court. We admit, that the Commissioner cannot charge the assignees with what they might have received, but for their default; but this is, as we contend, and as the Commissioner has found it to be, an actual receipt by the assignees, either by themselves, or by their agent. We say, that *Bostock* was their agent. As to the resolution of creditors appointing an agent,

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the other side have put their case upon too high ground, in this respect. The resolution amounted to nothing more than an authority to the assignees to appoint "some proper person" to be agent ; and they thereupon chose *Bostock*. And even that resolution only binds those creditors who were present. Wherever a person in a fiduciary situation appoints another as his agent, where there was neither legal nor moral necessity to do so, as in this case, he is liable for the agent's conduct. We admit, that where a woman is in the situation of a trustee,—as a person of her sex is presumed to be not conversant with business, or the transactions of buying and selling, and is therefore obliged to appoint a person who is competent to act for her,—she would not be held responsible for his failure. Upon the same principle, in *Raw v. Cutten*, the provisional assignee in London, who was tied to his duties there, and could not transact business down at *Southampton*, was for that reason exonerated from the failure of his agent. But these are only excepted cases ; and in *Massey v. Banner* (a), the doctrine of the general responsibility of trustees has been fully established.

Sir G. ROSE.—There is no difficulty in this case, as to the law. All we have now to inquire are about the facts. But in a case like this, we should be very particular in such inquiry before we decide ; because, if the assignees are, as it has been insisted upon, to be made personally to pay what they never personally received, a thousand cases of this description might come before us ; since in all bankruptcies, and especially before the appointment of official assignees, the assignees chosen by the creditors have been accustomed to employ

(a) 4 Mad. 431.

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agents, like *Bostock*, to transact for them various matters of business, which they were themselves incompetent to perform. As to the finding of the Commissioner, it is not as final and binding as a judgment; but even if it were a judgment, there might be special circumstances stated, so as to throw the whole question open to an inquiry of the nature which is now proposed. We cannot arrive at the merits of this case, without a reference to inquire whether the assignees might have received the money with which they are now sought to be charged, but for their wilful default. If they properly intrusted *Bostock*, they cannot be considered personally liable; but if they have misconducted themselves, and allowed him to retain it, and misapply it, then I think they will be responsible for his defaults.

ERSKINE, C. J. concurred.

Sir J. CROSS thought that the facts of the case were already sufficiently before the Court.

It was, however, finally referred to the Commissioner to take an account of the estate of the bankrupt, which the assignees, or any person for them, had received, or which but for their wilful default might have been received.

N. B.—The case was ultimately compromised under the sanction of the Court.



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**Ex parte BURNELL and others.—In the matter of
BENNETT and ROBINS.**

*Westminster,
May 30.*

A petition cannot be reheard to vary a former order, merely as to costs; more especially when that order was made a twelve-month ago, and was drawn up by the very parties who apply to vary it.

IN this case, upon a former petition to this Court, it appearing that the commission was improperly issued by the petitioning creditor, an order had been made on the 12th May 1832, by which it was directed, amongst other things, that *Joseph Malachy*, the petitioning creditor, should “pay the costs of the supersedeas, and those incidental thereto, together with the costs of the examinations, and also of all parties of and occasioned by the applications.”

The present petition, after reciting in full the former one, insisted that the order ought to have directed, that the petitioning creditor should “pay the costs of such supersedeas, and those incidental thereto, *as well as all the costs of the petitioners of and occasioned by the issuing and prosecution of the said commission*, and also the costs of all parties occasioned by the application.”

Mr. *Montagu*, and Mr. *Teed*, for the two assignees who presented the petition. It is quite manifest, from the several cases upon the subject, *Ex parte Graves* (a), *Ex parte Paul* (b), and numerous others, that the costs and expenses of and occasioned by the issuing and prosecution of a commission, which is superseded, fall, and very properly so, on the petitioning creditor. It is always a matter of course; and therefore the omission in the order, which is now complained of, was evidently an oversight. It will, no doubt, be objected, that the

(a) 1 G. & J. 86.

(b) Mont. & M. 185.

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Court cannot rehear a petition, on the subject of costs alone, and we admit that the rule of practice is against such rehearing; but these costs do not come within the ordinary meaning of the term *costs*: they are properly the expenses of issuing the commission. The objection to rehearing on the question of costs alone has been always confined to those costs, which depend on the merits of the petition, the costs of the petition itself, and the application then before the Court: but in this case they are quite of a different character; they are part of the merits of the petition, and not dependent on the merits; and as it is manifest we should have been entitled to receive them from the petitioning creditor, had they been mentioned before, the Court ought now to let us in by amending the mistake in the order. Suppose a great expense in a suit had been incurred, in resisting applications of mortgagees, and other third parties, can it be said that these would be costs in a cause? They would clearly be mere incidental expenses, as these in the present case are. The case of *Ex parte Baines* (a) is only in appearance opposed to the present application. It must have been erroneously reported, in respect to these words which are inserted at the end of the judgment, viz., "as the question was not, as to the personal payment of costs, but whether the costs were to be paid out of a particular fund." How that could affect the judgment, it is hard to say. The probability is, therefore, that these words were inserted by the reporter extra-judicially. All that was really decided in that case was, that on the original petition, the Court could not correct the order, but that there must be a petition for rehearing.

(a) 1 G. & J. 259.

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Mr. *Twiss* appeared for another assignee, who was not however a party to the original petition, nor to this; neither had he been served with the present petition.

Mr. *Swanston*, and Mr. *Bethell*, for the petitioning creditor, objected to Mr. *Twiss* being heard, as he was not served with this petition.

The COURT overruled the objection, stating, that as the other assignee was a party interested in the question, he had a right, if he chose, to appear gratuitously, and to be heard.

Mr. *Twiss*. There is no limit, it must be admitted, as to the time, or the cause, for rehearing a petition to rectify an order, except on the question of costs. Why this exception should exist only as to costs, it is hard to determine. It is, at any rate, an arbitrary rule, and seems to have no reason for its foundation; especially where the application arises on so palpable a mistake as the present, even if what is sought by this petition can be considered to come under the general denomination of *costs*. In *Ex parte Baines* (a) the question was purely as to the mode of proceeding; and putting the same construction on it as the petitioners do, that case amounts to an authority to show, that the Court will rehear on the subject of costs, where they are part of the essential merits of the petition, as in this case, and not incidental thereto. In *Jenour v. Jenour* (b) it was held, that where a question arises upon the interest in a trust fund separated from the general residue, the costs

(a) *Supra*.

(b) 10 Ves. 562.

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must come out of the particular fund; and the costs in that instance having been given by the decree, as specifically prayed by the bill, out of the general personal estate, the decree, (though affirmed in other respects) was corrected in that particular; the matter being considered in the nature of relief prayed, and therefore not within the rule against appealing for costs only. [Sir *J. Cross*. The object of a rehearing seems to be confined, merely, to the correction of some error of the Court.] Though the order in this case was settled by the counsel, yet it is no less an order of the Court, and the former petition prayed more (in fact) than the order gave. [Sir *J. Cross*. Admitting that, still the Court gave all you asked, when you the petitioners settled the minutes.] The case of *Owen v. Griffith* (a) shows, that Lord *Hardwicke* was inclined to relax this strict rule in such cases as the present, and that where the costs form part of the actual relief and merits, there may be a rehearing. In *Ex parte Streight, in re Eyles* (b), decided in this Court, I understand a rehearing was also allowed.

Mr. *Swanston*, and Mr. *Bethell*, for the petitioning creditor, were stopped by the Court.

ERSKINE, C. J.—If this claim had been raised on the original petition, I think there is no doubt but that we

(a) 1 Ves. sen. 249, and see note there; Ambler, 520, S. C.

(b) This was determined on the 15th December 1832. *Erskine*, C. J. then said “vary the order, and take the costs out of the estate, instead of against the assignees; but the order is made under the special circumstances, and must not form a precedent to break in upon the general rule as to rehearing for costs only.”

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should have indemnified the assignees, against the costs occasioned by the issuing and prosecuting the commission. But the question comes before us on a petition for rehearing, seeking that we should add to the relief obtained, the payment of costs not provided for by a former order. To this application two objections arise; first, that we cannot sanction it, by reason of the general rule, that there shall be no rehearing for costs; and secondly, that the order was drawn up in its existing form by the very parties who seek to vary it; and therefore that it is now too late to rehear the question of the right to these costs. A distinction has been attempted to be established between these costs, and the costs ordinarily incidental to a petition. But, I confess, I can see no difference. Besides, the 6 *Geo.* 4. c. 16., calls these very expenses the "costs." And if we were once to admit of such a distinction, there would be no limit to the nice refinements we might be drawn into, to the totally breaking down of the existing rule. If this rule, however, did not exist, I should still hardly be guided by the decision in *Ex parte Baines* (a), to grant the prayer of this petition; for the question now before us was not the main point in that case; the Vice-Chancellor there giving, as the reason for his decision, "that the question was not as to the personal payment of costs, but whether the costs were to be paid out of a particular fund." This expression reconciles that case with all others on the subject, and renders it perfectly intelligible; and that case also shows, that where the question relates to the personal payment of costs, even though they are not considered as mere costs of the

(a) *Supra.*

petition, but as forming part of the merits, the Court will not rehear a petition. In *Ex parte Streight* (a), *Jenour v. Jenour* (b), *Taylor v. Popham* (c), and all the other cases, this distinction has been taken between the personal payment of costs, and the fund from which they are to be liquidated. For these reasons,—besides the circumstance of the order being settled by the very parties now complaining, and feeling that it is better to abide by a general rule, than to open the door to litigation even in cases of particular hardship,—I think this petition must be dismissed.

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Sir J. CROSS.—I am always anxious that general rules should not defeat the equities of parties, if the due administration of justice will allow of their relaxation. But ought we, in a case like the present, to grant any such indulgence? Here, the petition was heard twelve months ago; the petitioners then carved for themselves, and drew up the order according to their own views; and now after this lapse of time, they come here to complain of their own acts. I think, independently of the question of form, that this is too unreasonable a demand to be complied with. I am also of opinion that, according to the established practice, it would be inexpedient and unjust to sanction for one moment such an application, and therefore entirely concur with his Honor the Chief Judge in the dismissal of this petition.

Sir G. ROSE.—Even if the existing rules of practice were not to be adhered to, in disposing of this case, I question very much, whether the Court would have

(a) *Supra*, and note.(b) *Supra*.

(c) 15 Ves. 72.

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BURNELL
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given to the assignees the costs they now seek to obtain. Next in degree to the obligation of the petitioning creditor, it is the duty of the assignees to see that their commission is well founded, and properly maintainable. They are trustees, at any rate, to uphold the fact of bankruptcy, whatever their duty may be to support any particular commission ; and the Court always expects that, when they come to supersede one commission, they will be prepared to open another, either by the substitution of a new debt, or a new act of bankruptcy. As between them and the petitioning creditor, therefore, when they come to supersede the bankruptcy *in toto*, they are regarded with great jealousy ; and it is doubtful in my mind, whether the Court would give them the costs as against the petitioning creditor. But on the point of practice alone, this petition is clearly unsustainable.

The petition was dismissed with costs, to be set off against the costs ordered to be paid by the petitioning creditor upon the original petition.

APPENDIX.

3 & 4 WILLIAM IV. c. 47.

An Act to authorize his Majesty to give further Power to the Judges of the Court of Bankruptcy, and to direct the Times of sitting of the Judges and Commissioners of the said Court.

[28th August 1833.]

WHEREAS by an act passed in the seventh year of the reign of his late Majesty King George the Fourth, intituled “An 7 G. 4. c. 57. act to amend and consolidate the laws for the relief of the insolvent debtors in England,” it is amongst other things enacted, that the court established for the relief of insolvent debtors in England shall be continued, and that the several persons appointed by his Majesty to be chief and other commissioners of the said court shall continue to be the chief and other commissioners of the said court, with all the powers, privileges, and authorities in the said act specified: And whereas by an act passed in the first and second years of the reign of his present Majesty, intituled, “An act to establish a 1 & 2 W. 4. c. 56. court in bankruptcy,” it is enacted, that it shall be lawful for his Majesty, his heirs and successors, by a commission under the great seal, to appoint one person to be the chief judge and three other persons to be other judges of the said last-mentioned court: And whereas such chief and other judges have been duly appointed under and by virtue of the said act: And whereas it has been found, that consistently with the vacation necessarily allowed to the commissioners of the first-mentioned court, and with the time occupied by them while they are on their several circuits, intervals occur in their sittings during which prisoners who would otherwise be entitled to their discharge cannot obtain the same: And whereas there are not a sufficient number of such commissioners to enable them to extend their circuits to the principality of Wales: of all which grievances repeated complaints

His Majesty may direct the judges, other than the chief, of the bankruptcy court, to act in the insolvent debtors' court.

Such judges to have the same powers as the commissioners of the insolvent debtors' court.

Insolvent court empowered to order prisoners to be brought before one of the commissioners, or judge, of the court of bankruptcy.

have been made : And whereas the business of the said court of bankruptcy will allow time for the judges of the said court, other than the chief, some one or more of them, to discharge part of the duties vested in the commissioners of the said first-mentioned court : be it enacted, that it shall and may be lawful for his Majesty, his heirs and successors, from time to time, by commission under the great seal of Great Britain, to authorize and direct the judges of the said court of bankruptcy, other than the chief judge, any one or more of them, to act in the said first-mentioned court as a commissioner or commissioners thereof, at such times and for such purposes as may in any such commission be specified.

II. And be it further enacted, that the said judge or judges so to be named in the said commission, shall have and may exercise all the powers, authorities, and privileges, whether in the court house of the said first-mentioned court, or upon the circuit, or elsewhere, which by the said first-recited act are given to or vested in the commissioners of the said first-mentioned court, or any one or more of them.

III. And be it further enacted, that it shall and may be lawful for the said first-mentioned court forthwith, after such petition and schedule as are by law required shall have been filed in the said court by any prisoner lawfully entitled so to do, being in any gaol within the principality of Wales, to order such prisoner to be brought before one of the commissioners of the said first-mentioned court, or judges of the said court of bankruptcy (acting by virtue of this act) proceeding on his circuit at such assize, or other town or place, within the county or county of a city or town, wherein such gaol shall be situate, as may be directed by order of the said first-mentioned court in that behalf; and the matters of the petition of such prisoner shall be heard by such commissioner or judge accordingly, who shall for that purpose have and exercise all the powers, authorities, and privileges, which are by law now vested in such commissioners severally on circuit in England; provided always, that nothing herein contained shall be construed to prevent the said first-men-

tioned court from ordering any such prisoner to be brought before the justices of the peace in the said act mentioned in cases where the said court may see fit so to do ; and that the matters of any such petition may be heard by such justices and all other proceedings had therein, in manner directed by the said first-recited act.

IV. And be it further enacted, that the clerks of the peace for the several counties within the principality of Wales, or their deputies, shall bring to the place of hearing of any petition of any such prisoner before such judge or commissioner the duplicate of petition, and schedule, books, papers, and writings lodged with him, as by the said first-recited act the clerks of the peace in England, and their deputies, are required to do before the commissioners going circuits in England ; and that such clerks of the peace in Wales, or their deputies, shall do all such other acts at the times of such hearings, and be entitled to such fees and allowances, as are required of or allowed to clerks of the peace in England and their deputies.

Clerks of the peace of principality of Wales to bring to the place of hearing petitions, the duplicate of petition, schedule, &c.

V. And be it further enacted, that it shall and may be lawful for the lord high treasurer or lords commissioners of his Majesty's treasury of the united kingdom of Great Britain and Ireland for the time being, to direct that such sum or sums shall be paid as may appear fit and necessary for the defraying the travelling expenses of such judge or judges, with their or his registrar or deputy registrar, and other necessary officers, in the execution of their duties under this act.

Treasury may direct payment of travelling expenses of judges, &c.

VI. And be it further enacted, that it shall and may be lawful for the court of review in bankruptcy to order and direct any one or more of the registrars, or deputy registrars, of the said court of bankruptcy to attend any one or more of the said judges in the discharge of their duties under this act, and to give such attendance and perform such duties, as the said court of review may by any order direct.

Court of review may direct registrars, or deputy registrars, to attend the said judges.

Powers given to his Majesty with respect to the court of bankruptcy.

VII. And be it further enacted, that it shall be lawful for his Majesty, his heirs and successors, by warrant under his royal sign manual, from time to time, to authorize any one or more judges of the said court of bankruptcy to exercise the same jurisdiction and power in all respects, as by the said secondly recited act is and are given to any three of such judges; and also by any such or the like warrant to direct at what times the said court of review, and the judges or commissioners of the said court of bankruptcy, and every of them, shall respectively hold their sittings.

Court of review may order costs to be taxed by a registrar.

VIII. And be it further enacted, that it shall and may be lawful for the said court of review to order that any costs, which by the said secondly recited act are directed to be taxed, by one of the masters of the high court of Chancery, shall and may be taxed by one of the registrars, or deputy registrars, of the said court of bankruptcy.

3 & 4 WILLIAM IV. c. 41.

An Act for the better Administration of Justice in his Majesty's Privy Council.
[14th August 1833.]

(So far as it relates to Bankruptcies.)

Two judges of the court of bankruptcy to act for the chief judge of the court of review during his attendance at the judicial committee of the Privy Council

Section XXVI. And be it further enacted, that during the absence of the chief judge in bankruptcy from the court of review established by virtue of an act passed in the first and second years of his present Majesty, intituled "An act to establish a court in bankruptcy," by reason of his attendance at the said judicial committee by virtue of this act, any two judges of the said court shall and may form a court of review in bankruptcy, and shall and may make, do, and execute all orders, acts, matters, powers, and things whatsoever, which by virtue of the said act the judges of the said court or any three of them are authorized to make, do, or execute, and in all respects whatsoever as if three of the said judges were present; except that nothing herein contained shall authorize any two judges of the said court to hear and determine any

matter brought under the review of the said court, by way of appeal from the determination or decision of any commissioner or subdivision court appointed by virtue of the said act.

3 & 4 WILLIAM IV. c. 74.

An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance.

[28th August 1833.]

(So far as it relates to Bankruptcies.)

Section LV. And be it further enacted, that after the 31st day of December one thousand eight hundred and thirty three, so much of an act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled "An act to amend the laws relating to bankrupts," as empowers the commissioners named in any commission of bankrupt issued against a tenant in tail to make sale of any lands, tenements, and hereditaments, situate either in England or Ireland, whereof such bankrupt shall be seised of any estate tail in possession, reversion, or remainder, and whereof no reversion or remainder is in the crown, the gift or provision of the crown, shall be, and the same is hereby repealed: provided always, that such repeal shall not extend to the lands, whatever the tenure may be, of any person adjudged a bankrupt under any commission of bankrupt, or under any fiat which in pursuance of the said act of the sixth year of the reign of King George the Fourth, or of any former act concerning bankrupts, or of an act passed in the first and second years of the reign of his Majesty King William the Fourth, intituled "An act to establish a court of bankruptcy," hath been or shall be issued, on or before the thirty-first day of December one thousand eight hundred and thirty-three: provided also, that such repeal shall not have the effect of reviving in any respect the acts repealed by the said act of the sixth year of the reign of King George the Fourth, or any of them.

Repeal of the bankrupt act, 6 G. 4. c. 16. s. 65., so far as relates to estates tail, but not to extend to lands of a bankrupt under a commission, or fiat, issued on or before the 31st of December 1833, nor to revive former acts.

The commissioner, in the case of an actual tenant in tail becoming bankrupt after the 31st December 1833, by deed to dispose of the lands of the bankrupt to a purchaser.

LVI. And be it further enacted, that any commissioner acting in the execution of any fiat, which after the thirty-first day of December one thousand eight hundred and thirty-three, shall be issued in pursuance of the said act passed in the first and second years of the reign of King William the Fourth, under which any person shall be adjudged a bankrupt, who at the time of issuing such fiat or at any time afterwards, before he shall have obtained his certificate, shall be an actual tenant in tail of lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of such actual tenant in tail, and shall create by any such disposition as large an estate in the lands disposed of as the actual tenant in tail, if he had not become bankrupt, could have done under this act at the time of such disposition : provided always, that if at the time of the disposition of such lands, or any of them, by such commissioner as aforesaid, there shall be a protector of the settlement by which the estate of such actual tenant in tail in the lands disposed of by such commissioner was created, and the consent of such protector would have been requisite to have enabled the actual tenant in tail, if he had not become bankrupt, to have disposed of such lands to the full extent to which, if there had been no such protector, he could under this act have disposed of the same, and such protector shall not consent to the disposition, then and in such case the estate created in such lands, or any of them, by the disposition of such commissioner, shall be as large an estate as the actual tenant in tail, if he had not become bankrupt, could at the time of such disposition have created under this act in such lands without the consent of the protector.

Commissioner, in case of a tenant in tail entitled to a base fee becoming bankrupt, and of there being no protector, by deed to dispose of the lands of a bankrupt to a purchaser.

LVII. And be it further enacted, that any commissioner acting in the execution of any such fiat as aforesaid, under which any person shall be adjudged a bankrupt, who at the time of issuing such fiat, or at any time afterwards, before he shall have obtained his certificate, shall be a tenant in tail entitled to a base fee in lands of any tenure, shall by deed dispose of such lands to a purchaser for a valuable consideration, for the benefit of the creditors of the person so entitled

the clause next hereinafter contained, apply to every consent that may be given by virtue of this present clause.

As to the inrolment in Chancery of the deed of disposition of freehold lands, and the entry on the court rolls of the deed of disposition of copyhold lands; and of the deed of consent.

LIX. And be it further enacted, that every deed by which any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of lands not held by copy of court roll, shall be void, unless inrolled in his Majesty's high court of Chancery within six calendar months after the execution thereof; and every deed by which any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of lands held by copy of court roll, shall be entered on the court rolls of the manor of which the lands may be parcels; and if there shall be a protector who shall consent to the disposition of such lands held by copy of court roll, and he shall give his consent by a distinct deed, the consent shall be void, unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the commissioner; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of every manor, of which any lands disposed of under this act by any such commissioner as aforesaid may be parcel, or the steward of such lord, or the deputy of such steward, to enter on the court rolls of the manor every deed required by this present clause to be entered on the court rolls, and he shall indorse on every deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls.

Subsequent enlargement of base fees created by the disposition of the commissioner.

LX. And be it further enacted, that if any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of any lands of any tenure of which the bankrupt shall be actual tenant in tail, and in consequence of there being a protector of the settlement, by which the estate of such actual tenant in tail was created, and of his not giving his consent, only a base fee shall by such disposition be created in such lands, and if at any time afterwards during the continuance of the base fee there shall cease to be a protector of such settlement, then and in such case, and

immediately thereupon, such base fee shall be enlarged into the same estate into which the same could have been enlarged under this act, if at the time of the disposition by such commissioner as aforesaid, there had been no such protector.

LXI. And be it further enacted, that if a tenant in tail entitled to a base fee in lands of any tenure shall be adjudged a bankrupt, at the time when there shall be a protector of the settlement by which the estate tail converted into the base fee was created, and if such lands shall be sold or conveyed under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any other acts hereinafter to be passed concerning bankrupts, and if at any time afterwards during the continuance of the base fee in such lands there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, the base fee in such lands shall be enlarged into the same estate into which the same could have been enlarged under this act, if at the time of the adjudication of such bankruptcy there had been no such protector, and the commissioner acting in the execution of the fiat, under which the tenant in tail so entitled shall have been adjudged a bankrupt had disposed of such lands under this act.

Enlargement of base fees subsequent to the sale or conveyance of the same under the bankrupt acts.

LXII. Provided always, and be it further enacted, that where an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall have already created, or shall hereafter create, in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall be adjudged a bankrupt under any such fiat as aforesaid, and the commissioner acting in the execution of such fiat shall make any disposition under this act of the lands in which such voidable estate shall be created, or any of them, then and in such case, if there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created, or being such protector he shall consent to the disposition

A voidable estate created in favour of a purchaser by an actual tenant in tail becoming bankrupt, or by a tenant in tail entitled to a base fee becoming bankrupt, confirmed by the disposition of the commissioner, if no protector, or being such with his consent, or on there ceasing to be a protector, but not against a purchaser without notice.

by such commissioner as aforesaid, whether such commissioner may have made under this act a previous disposition of such lands or not, or whether a prior sale or conveyance of the same lands shall have been made or not, under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any acts hereafter to be passed concerning bankrupts, the disposition by such commissioner shall have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons, except those whose rights are saved by this act; and if at the time of the disposition by such commissioner, in the case of an actual tenant in tail, there shall be a protector, and such protector shall not consent to the disposition by such commissioner, and such actual tenant in tail, if he had not been adjudged a bankrupt, would not, without such consent, have been capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate, so far as such actual tenant in tail, if he had not been adjudged a bankrupt, could at the time of such disposition have been capable under this act of confirming the same, without such consent; and if at any time after the disposition of such lands by such commissioner, and while only a base fee shall be subsisting in such lands, there shall cease to be a protector of such settlement, and such protector shall not have consented to the disposition by such commissioner, then and in such case such voidable estate, so far as the same may not have been previously confirmed, shall be confirmed to its full extent as against all persons except those whose rights are saved by this act: provided always, that if the disposition by any such commissioner as aforesaid shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed against such purchaser, and the persons claiming upon him.

LXIII. And be it further enacted, that all acts and deeds done and executed by a tenant in tail of lands of any tenure, who shall be adjudged a bankrupt under any such fiat

tenant, in tail of such lands, and there shall at the time of the disposition be any issue inheritable to the estate tail of the bankrupt in such lands, and either no protector of the settlement by which the estate tail was created, or a protector of such settlement, who, in the manner required by this act, shall consent to the disposition, or a protector of such settlement, who shall not consent to the disposition; or in case the bankrupt had been a tenant in tail entitled to a base fee in such lands, and there shall at the time of the disposition be any issue, who if the base fee had not been created would have been actual tenant in tail of such lands, and either no protector of the settlement, by which the estate tail converted into a base fee was created, or a protector of such settlement, who, in the manner required by this act, shall consent to the disposition.

Every disposition by the commissioner of copyhold lands, where the estate shall not be equitable, to have the same operation as a surrender; and the person, to whom such land shall have been disposed of, may claim to be admitted, on paying the fines, &c.

LXVI. And be it further enacted, that every disposition, which under this act may be made by any commissioner acting in the execution of any such fiat as aforesaid, of lands held by copy of court roll, shall, in every case in which the estate of the bankrupt in such lands shall not be merely an estate in equity, operate in the same manner as if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, been duly surrendered into the hands of the lord of the manor of which they may be parcel, to the use of the person to whom the same shall have been disposed of by such commissioner; and the person to whom the lands shall have been so disposed of by such commissioner may claim to be admitted tenant of such lands, to hold the same by the ancient rents, customs, and services, in the same manner as if such lands had been duly surrendered to his use into the hands of the lord of the manor of which such lands may be parcel, and shall, upon being admitted tenant of such lands, to hold the same as aforesaid, pay the fines, fees, and other dues, which could have been lawfully demanded upon such admittance, if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as afore-

said, passed by surrender into the hands of the lord, to the use of the person so admitted.

LXVII. And be it further enacted, that the rents and profits of any lands, of which any commissioner acting in the execution of any such fiat as aforesaid hath power to make disposition under this act, shall in the meantime and until such disposition shall be made, or until it shall be ascertained that such disposition shall not be required for the benefit of the creditors of the person adjudged bankrupt under the fiat, be received by the assignees of the estate of the bankrupt, for the benefit of his creditors; and the assignees may proceed by action of debt for the recovery of such rents and profits, or may distrain for the same upon the lands subject to the payment thereof; and in case any action of trespass shall be brought for taking any such distress, may plead thereto the general issue, and give this act or other special matter in evidence, and also, in case any such distress shall be replevied, shall have power to avow, or make cognizance, generally, in such manner and form as any landlord may now do by virtue of the statute made in the eleventh year of the reign of his Majesty King George the Second, intituled "An act for the more effectual securing the payment of rents and preventing frauds by tenants," or by any other law or statute now in force, or hereafter to be made for the more effectually recovering of rent in arrear; and such assignees, and their bailiffs, agents, and servants, shall also have all such and the same remedies, powers, privileges, and advantages of pleading, avowing, and making cognizance, and be entitled to the same costs and damages, and the same remedies for the recovery thereof, as landlords, their bailiffs, agents, and servants, are now, or hereafter may be, by law entitled to have when rent is in arrear; and such assignees shall also have the same power and authority of enforcing the observance of all covenants, conditions and agreements, in respect of the lands of which such commissioner as aforesaid hath the power of disposition under this act and in respect of the rents and profits thereof, and of entry into and upon the same lands for the non-observance of any such covenant,

Assignees to recover rents of the lands of a bankrupt, of which the commissioner has power to make disposition, and to enforce covenants, as if entitled to the reversion.

This clause to apply to all copyhold lands; but as to other lands, only to such as the commissioner may dispose of after the bankrupt's death.

11 Geo. 2. c. 19.

condition, and agreement, and of expelling and removing therefrom the tenants or other occupiers thereof, and thereby determining and putting an end to the estate of the persons who shall not have observed such covenants, conditions, and agreements, as the bankrupt would have had in case he had not been adjudged a bankrupt; provided always, that this clause shall apply to all lands held by copy of court roll, but shall only apply to those lands of any other tenure, which any commissioner acting in the execution of any such fiat as aforesaid may have power to dispose of under this act after the bankrupt's decease.

All the provisions of the act in regard to bankrupts shall apply to their lands in Ireland.

LXVIII. And be it further enacted, that all the provisions in this act contained for the benefit of the creditors of persons, who, under such fiats as aforesaid, shall be adjudged bankrupts after the thirty-first day of December one thousand eight hundred and thirty-three, and for the confirmation in consequence of bankruptcy of voidable estates created by them, shall extend and apply to the lands of any tenure in Ireland of such persons, as fully and effectually as if this act had throughout extended to the lands of any tenure in Ireland; saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the Crown in lands in Ireland.

Deeds relating to the lands of bankrupts in Ireland to be inrolled in the court of Chancery there.

LXIX. Provided always, and be it further enacted, that in all cases of bankruptcy, every deed of disposition under this act of lands in Ireland by any commissioner acting in the execution of any such fiat as aforesaid, and also every deed by which the protector of a settlement of lands in Ireland shall consent, shall be inrolled in his Majesty's high court of Chancery in Ireland, within six calendar months after the execution thereof, and not in his Majesty's high court of Chancery in England.

The previous clauses, with certain variations, to apply to lands of any

LXXI. And be it further enacted, that lands to be sold, whether freehold or leasehold, or of any other tenure, whether the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that

any person, if the lands were purchased, would have an estate tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, shall for all the purposes of this act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to: and all the previous clauses in this act, so far as circumstances will admit, shall, in the case of the lands to be sold as aforesaid being either freehold or leasehold, or of any other tenure, except copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be freehold, and were actually purchased and settled; and shall, in the case of the lands to be sold as aforesaid being held by copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be copyhold and were actually purchased and settled; and shall, in the case of money subject to be invested in the purchase of lands to be so settled as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled; save and except that in every case where under this clause a disposition shall be to be made of leasehold lands for years absolute or determinable, so circumstanced as aforesaid, or of money so circumstanced as aforesaid, such leasehold lands or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate, and, except in case of bankruptcy, the assurance, by which the disposition of such leasehold lands or money shall be effected, shall be an assignment by deed; which shall have no operation under this act unless inrolled in his Majesty's high court of Chancery within six calendar months after the execution thereof; and in every case of bankruptcy the disposition of such leasehold lands or money shall be made by the commissioner, and completed by inrolment in the same manner

tenure to be sold, where the purchase money is subject to be invested in the purchase of lands to be entailed, and where money is subject to be invested in like manner.

as hereinbefore required in regard to lands not held by copy of court roll.

Lands of any tenure in Ireland, to be sold where the purchase money is subject to be invested in the purchase of lands to be entailed, and money under the control of a court of equity in Ireland, subject to be invested in like manner, to be subject to this act in cases of bankruptcy.

LXXII. And be it further enacted, that so far as regards any person adjudged a bankrupt under any such fiat as aforesaid, the provisions of the clause lastly hereinbefore contained shall, for the benefit of the creditors of the bankrupt, apply to lands in Ireland to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, and also to money under the control of any court of equity in Ireland, or of or to which any individuals as trustees may be possessed or entitled in Ireland, and which shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein as fully and effectually as if this act had throughout extended to Ireland; provided always, that every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to lands in Ireland to be so sold as aforesaid, shall be inrolled in his Majesty's high court of Chancery in Ireland within six calendar months after the execution thereof; and every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to money subject to be invested in the purchase of lands to be so settled as aforesaid, shall be inrolled in his Majesty's high court of Chancery in England, within six calendar months after the execution thereof, and not in his Majesty's high court of Chancery in Ireland: saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the Crown in lands in Ireland to be sold.

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ACCEPTANCE OF LEASE.

A coach-maker who was tenant from year to year of certain premises, and had several coaches on hire, became bankrupt, and his assignees entered upon the premises to keep the coaches in repair, in pursuance of the bankrupt's contracts. In August the bankrupt's effects were sold and the key of the premises delivered to the bankrupt,

but the assignees paid the rent up to the Michaelmas following. In an action by the landlord for a quarter's rent, due the Christmas following:—Held, that the assignees were liable. *Ansell v. Robson*, 1832. 2 Crompt. & J. 610.

ACCIDENT.

Where, from unavoidable accident, the Commissioners are prevented

from meeting to take the bankrupt's last examination, the Court will appoint another day for that purpose. *Ex parte Wilson*. 2 Dea. & Chit. 388.

ACCOMMODATION BILL.

See *Ex parte Laforest*, 2 D. & Chit. 199.

An accommodation indorser is a person liable to pay the bill for the party accommodated; against whom, therefore, if he become bankrupt, such indorser, though not called on to pay the bill till after the bankruptcy, may prove the amount under section 52 of 6 G. 4. c. 16. And the bankrupt being discharged from any suits for the amount by his certificate, is, in an action on the bill, a competent witness for such indorser. *Basset v. Dodgin*, 9 Bing. 653. S. C. 2 Moore & S. 777.

ACCOUNT.

Although an audit meeting has closed, and the assignees' accounts are then settled, the Commissioner at any future meeting has power to examine the assignees as to monies received before and not included in such accounts, and to reinvestigate those accounts generally, if need be. *In re Applegath*. 2 Dea. & Chit. 101.

A bankrupt's pass book delivered to his customer, in which there are entries on one side only, is not evidence of a settled account between the parties, although the

customer keeps the book, without making any objection to the entries contained in it. *Ex parte Randleson*. 2 Dea. & Chit. 534.

An assignee was removed and ordered to account. Pending that order, the new assignee petitioned for the taxation of the bill of the solicitors employed by the discharged assignee, and that they might be ordered to account for money charged to have been improperly received by them with the privity of the former assignee:—Held, that the petition was premature during the pendency of the former order; but the Court retained it, under the circumstances, until the result of the pending account was known. *Ex parte Carter*. 2 Dea. & Chit. 626.

ACQUIESCENCE.

See also CONSENT.

A bankrupt who had never surrendered, was restrained by order from proceeding in actions against the assignees and a purchaser under the commission, to try its validity, after long acquiescence, and acts of co-operation in the proceedings consequent upon the commission, done by him or under his authority. *Ex parte Hornby*, 1882. 1 Mont. & B. 1.

If a creditor petition to supersede, or that the assignees be removed, and the supersedeas is refused, but the assignees are removed, upon the petitioner's counsel undertak-

ing that the petitioner should prove, the creditor cannot appeal as to the supersedeas. *Ex parte Green*, 1832. 1 Mont. & B. 90.

ACT OF BANKRUPTCY.

And see RELATION.

The declarations of a trader made shortly after an absence, are not admissible to prove such absence an act of bankruptcy. *Lees v. Morton*. 1 Mood. & R. 210. But see *Ex parte Palmer*. 1 Dea. & Chit. 373, 374.

Semble, that a breach of an appointment by a trader to call at his creditor's house to pay a debt, is not an act of bankruptcy. *Ibid*.

To substantiate an act of bankruptcy against a trader, evidence was given of his having caused himself to be denied to creditors, when he was at the same time seen concealing himself in a retired part of the shop. The judge told the jury, that if the bankrupt had kept his house, or had wilfully secluded himself for the purpose of avoiding his creditors, or had removed himself from that part of the house where he had been accustomed to be found, to a more retired part, where he could not so readily be seen by his creditors, with intent to avoid them, he thereby committed an act of bankruptcy:—Held, that this direction was proper. *Key v. Shaw*. 1 Moore & S. 462.

The mere failure to keep an appoint-

ment, made with a creditor, is not an act of bankruptcy. *Ibid*. S. C. 8 Bing. 320.

A commission of bankrupt issued against an infant upon a debt contracted, and an act of bankruptcy committed, during his minority, is absolutely void; and, if the assignees have reason to know that he intends to set up his infancy, it is not necessary for him to give them the notice required by the 90th section of the statute 6 G. 4. c. 16, that he intends to dispute the proceedings under the commission. *Belton v. Hodges*. 2 Moore & S. 496. S. C. 9 Bing. 365.

A trader abstaining from going to a particular place through the apprehension of process (whether such apprehension be well founded or not), thereby "absents himself with intent to delay his creditors," and commits an act of bankruptcy. *Robson v. Rolls*. 2 Moore & Scott, 786. S. C. 9 Bing. 648.

According to the practice of the Insolvent Debtors' Court, the petition of the insolvent is signed by him in prison, and there delivered to the provisional assignee of the Court:—Held, that the petition is not filed, within the meaning of the 13th section of the statute of 7 Geo. 4. c. 57, so as to constitute an act of bankruptcy, until it reaches its final destination,—the custody of the proper officer in the office. *Garlick v. Sangster*.

2 Moore & Scott, 68. S. C. 9 Bing. 46.

A trader, being pressed for payment of a debt by the attorney of a creditor, promised to give him a security on the following day; instead of which he left his place of residence, and immediately afterwards gave security to another creditor, a relation. On his return home, at the expiration of nearly a month, the attorney of a former creditor, in the course of a conversation, asked him what security he had given his relation; to which he replied, "he did not know:"—Held, that the declarations of the debtor in that conversation were admissible in evidence to support an alleged act of bankruptcy in giving the securities to his relation, by way of *fraudulent preference*, and to show the conduct of the party giving them; although it was objected that the conversation took place in the absence of the person to whom the securities were given, and at too great a distance of time (a month) from the completion of that transaction. *Ridley v. Gyde*. 2 Moore & Scott, 448. S. C. 9 Bing. 349.

Though a concerted commission or fiat in bankruptcy is protected by 1 & 2 Will. 4. c. 56. s. 42, a concerted act of bankruptcy is still a nullity. *Marshall v. Barkworth*. 1 Nevile & Mann: 279.

ACTIONS.

By Assignees.

Where the drawer of a bill of exchange deposits it with a creditor, giving him authority to receive the proceeds, and apply them in a specified way,—if the creditor, after an act of bankruptcy by such drawer, gives up the original bill to the acceptor (taking another bill in lieu of it) this is a conversion by the creditor, and the assignees of the drawer may support trover. *Robson v. Rolls*. 1 Mood. & R. 238.

An official assignee must be joined in an action brought by the other assignees. But where his name was omitted in the declaration, the Court allowed it to be amended by inserting his name. *Baker v. Newce*. 8 Tyr. 233.

The assignee of an insolvent cannot recover in an action commenced by him, as assignee, before the assignment executed to him, though it be executed before the trial, but not before the declaration. *Lawrence v. Miller*. 2 Mood. & M. 97.

The defendant held premises under a lease from one J. H. at a certain rent; and entered into an agreement with one N. for the sale of all the household furniture &c., on the premises for a certain sum, to be paid by instalments, covenanting, on payment of the whole of the purchase money, to demise

the premises to *N.* for 25 years; the lease to contain the like covenants on the part of *N.*, as were contained in the lease under which the defendant held. The agreement also contained a covenant that *N.* should in the meantime, and until such lease should be granted, pay the rent and perform all the covenants which would be to be performed by him, in case the lease was actually granted; with a power of distress for nonpayment of the rent. *N.* was let into immediate possession under this agreement, and paid rent. The defendant neglecting to satisfy the rent due to the superior landlord, the latter distrained and sold the goods of *N.*:—Held, that the injury resulting to *N.* from the distress, gave a right of action to his assignees appointed under a commission subsequently issued against him. *Hancock v. Caffin.* 1 Moore & Scott, 521. S. C. 8 Bing. 358.

A. hired a phaeton from *B.*, and let it to the defendant, by whom it was damaged. *B.* repaired it, and afterwards proved for the amount of the repairs under a commission of bankrupt issued against *A.* No dividend was paid under *A.*'s commission:—Held, that the assignees of *A.* were entitled to maintain an action against the defendant for the breach of his implied contract to use the carriage in a moderate and a proper manner; but for nomi-

nal damages only—there being no proof that the estate of *A.* was ever likely to pay any dividend. *Porter v. Vorley.* 2 Moore & Scott, 141. S. C. 9 Bing. 93.

Where the assignee of a bankrupt is removed, and a new one appointed, *quære*, whether a party having money in his hands which he received on account of the bankrupt's estate, in the character of agent to the late assignee, be liable in assumpsit for money had and received to the use of the newly appointed one? But, the former assignee being insane when the money was received, Held, that such receiver was liable at all events, for he could not be the agent of an insane person, and therefore held the property as a mere stranger. *Stead v. Thornton,* 3 Barn. & Adol. 357.

Against Assignee.

A tradesman undertook to do work upon an article delivered to him for a person to whom he was indebted, and it was agreed that the work should be paid for in ready money. He afterwards became bankrupt:—Held, that the act 6 Geo. 4. c. 16, s. 50., (which provides for the setting off of cross demands where there has been mutual credit between the bankrupt and a party claiming on his estate,) did not, in this case, render the assignees liable in

trover for refusing to deliver such article to the creditor on his offering to set off the price of the work against his own demand. *Clarke v. Fell*. 4 Barn. & Adol. 404.

By Bankrupt.

Where a bankrupt petitions to supersede, and at the same time brings an action against the petitioning creditor to try the validity of the fiat, he must elect which remedy he will pursue. *Ex parte Drake*. 2 Dea. & Ch. 91. *Vide post*.

Where a bankrupt petitions to supersede, and brings an action at the same time to dispute the bankruptcy, the Court declined compelling him to elect which proceeding he would continue, but ordered that the petition should stand over until the result of the action was known. *Ex parte Chambers*, 2 Dea. & Ch. 372. *Vide ante*.

In an action for maliciously suing out a commission, it is not sufficient to prove merely that the commission was superseded; for a *supersedeas* may proceed upon strict legal grounds, and does not, therefore, furnish evidence of the want of probable cause. *Hay v. Weakley*, 5 Car. & P. 361.

Where parties have become bank-

rupt in France, but have been reinstated in their affairs by a *concordat*, it is not necessary in an action brought by them for money due to them before their bankruptcy, to prove that they have performed their part of the *concordat*; but they should show that the action is brought with the assent of the Commissioners named therein. *Orr v. Brown*, 5 Car. & P. 414.

Against Bankrupt.

By 6 Geo. 4. c. 16. s. 126., a certificated bankrupt may plead his bankruptcy to any action for a debt which was provable under the commission. *Robertson v. Score*. 3 Barn. & Adol. 338.

Semble, that 6 Geo. 4. c. 16. s. 127., extends to cases where the former bankruptcy and certificate were anterior to the statute: but, Held, that that section, where applicable, does not entitle a creditor to proceed against the bankrupt after a second certificate, for a debt which he might have proved under the commission. *Robertson v. Score*, 1832. 3 Barn. & Adol. 338.

The statute 6 Geo. 4. c. 16. s. 127., which vests in assignees the future effects of a bankrupt who had before been bankrupt, or taken the benefit of an insolvent act,

and has not paid 15s. in the pound under the subsequent commission, does not apply to a bankrupt who had obtained his 'certificate under such subsequent commission, before that statute passed; and therefore, where *A.*, after being discharged under an insolvent act, had a commission of bankrupt issued against him, and obtained his certificate before the passing of 6 *Geo.* 4. c. 16., but did not pay 15s. in the pound, and he was afterwards sued on a bond executed before his discharge under the insolvent act, but not inserted in his schedule, it was held, that his certificate did not bar the action. *Carew v. Edwards*, 1832. 4 Barn. & Adol. 351.

ADMINISTRATOR.

An administrator, having received assets of the intestate, converted them to his own use, and became bankrupt before he had exhibited an inventory, or made his account, pursuant to the bond given under the statute of distributions, 22 *Car.* 2. c. 10., and before any decree to pay or deliver the residue to the next of kin was obtained. The Ecclesiastical Court discharged him from the suit there, he having obtained his certificate as a bankrupt:—Held, that his malfeazance, in converting to his own use the intestate's assets, so that they were entirely lost to his estate, was a

breach of the clause of the condition "well and truly to administer" them; and consequently that the surety in the administration bond was liable for the full amount of the money misapplied. *Archbishop of Canterbury v. Robertson*. 3 Tyrw. 390.

ADMISSION OF DEBT.

A fiat was sued out on the 7th June by an attorney against his debtor, for the amount of his bill of costs, and the bankrupt was shortly afterwards discharged under the insolvent act, having inserted the amount of the attorney's bill in his schedule. The bankrupt passes his last examination; and on the 4th December petitions for an order to tax the attorney's bill, with a view of superseding the fiat, on the ground of the insufficiency of the petitioning creditor's debt: Held, that the bankrupt could not, after lying by so long, and after his previous admission of the debt, apply for such an order. *Ex parte Gingell*. 2 Dea. & Chit. 546.

ADJOURNED EXAMINATION.

Semble. This Court has no power to commit on an adjourned examination from before one Commissioner. *In re Heath*. 2 Dea. & Chit. 214. S. C. 1 M. & B. 184.

ADJOURNMENT OF HEARING.

Where a party, on the hearing of a

petition, makes use of an affidavit to prove his case, the Court will not, because the affidavit does not go far enough for his purpose, adjourn the hearing of the petition to a future day, to enable him to examine the deponent *vivâ voce*, unless the other party consents to such adjournment; for the deponent ought to have been in attendance, if it was likely that his personal examination would be necessary. *Ex parte Dickenson*. 2 Dea. & Chit. 520.

ADJUDICATION, STAYING.

Adjudication stayed, on affidavit that the party owed no debt to the petitioning creditor, and had not committed an act of bankruptcy. *Ex parte Fletcher*. 2 Dea. & Chit. 90.

ADVERTISEMENT, STAYING.

Advertisement in Gazette not postponed to give effect to compromise, where commission is not disputed. *Re Hambden*. 2 Dea. & Chit. 209.

Where the person against whom a fiat is issued applies to the Court for a suspension of the advertisement in the Gazette, and swears positively that he owes no debt to the petitioning creditor, it is not necessary that the Court should inspect the proceedings. *In re Fletcher*. 2 Dea. & Chit. 317.

Where a trader against whom a fiat

issues, swears that he owes no debt to the petitioning creditor, and has committed no act of bankruptcy, the Court will stay the advertisement in the Gazette; *â fortiori*, if there does not appear to be a clear debt and act of bankruptcy on the proceedings. *Ex parte Fletcher*. 2 Dea. & Chit. 521.

The publication of the advertisement of a bankruptcy will not be postponed, although a large majority of the creditors consent. *Ex parte Raffenstein*, 1633. 1 Mont. & B. 11.

The advertisement will not be stayed if the requisites are sufficient. *Ex parte Edwards*, 1833. 1 Mont. & B. 255.

AFFIDAVIT.

Where the bankrupt's certificate has been stayed at the instance of creditors, who afterwards withdraw their opposition to it, and appear by counsel to consent to its allowance, the Court will allow the certificate, without the usual explanatory affidavit of the absence of collusion. *In re Hall*. 2 Dea. & Chit. 44.

Adjudication stayed, on affidavit that the party owed no debt to the petitioning creditor, and had not committed an act of bankruptcy. *Ex parte Fletcher*. 2 Dea. & Chit. 90.

Affidavits not referred for impertinence till hearing of petition. *Ex parte Arnsby.* 2 Dea. & Chit. 119.

What affidavit necessary of residence of creditors to annul town fiat and issue a country one. *Ex parte Leonard.* 2 Dea. & Chit. 182.

Where documents are referred to in an affidavit, it does not give the other side an absolute right to their production, but it is a matter for the discretion of the Court. Motion for this purpose, before hearing petition, refused with costs. *Ex parte Arnsby.* 2 Dea. & Chit. 192.

An affidavit, though not filed, may be read, upon an undertaking to file it. *Ex parte Baker.* 2 Dea. & Chit. 362.

Upon an affidavit being taken off the file for scandal, the solicitor who filed it is liable for all costs and expenses as between solicitor and client. *Ex parte Wake,* 1 Mont. & B. 259.

AGENT.

The charge of 10s. per cent. for commission besides the legal interest, on a loan of money, is not usurious, if it is referable to trouble and expense bona fide incur-

red by the lender; although he may not be a banker, or a person engaged in trade, or although the money lent is his own, and not that of other persons. *Ex parte Gwyn.* 2 Dea. & Chit. 12.

A summary application being made against three attornies, jointly, to pay over to the assignees a sum of money which they had received as the bankrupt's solicitors under an order of the Court of Chancery:—Held, not sustainable, as they were not all collectively attornies of this court. *Quære*, whether such an order would have been made, if they had been all attornies of this Court. *Ex parte Hicks.* 2 Dea. & Chit. 573. S. C. 1 M. & B. 256.

Where the assignee of a bankrupt is removed, and a new one appointed. *Quære*, whether a party having money in his hands which he received on account of the bankrupt's estate, in the character of agent to the late assignee, be liable in assumpsit for money had and received, to the use of the newly appointed one? But, the former assignee having been insane when the money was received:—Held, that such receiver was liable at all events; for he could not be the agent of an insane person, and therefore held the property as a mere stranger. *Stead v. Thornton.* 3 Barn. & Adol. 357.

ALLOWANCE.

See BANKRUPTS' ALLOWANCE.

ANNUITY.

See also VALUATION OF ANNUITY.

Where a testator bequeaths the whole of his property to trustees, for the payment of an annuity, and other purposes, and the trustees become bankrupt, the trust fund must be set apart for the payment of the whole annuity, without regard to the interests of the persons entitled to the residue. *Ex parte Rothwell*. 2 Dea. & Chit. 542.

An annuity granted by *A.* to *B.* was secured by a covenant by *C.*, a surety, to pay the annuity in case *A.* made default, and by a judgment for 2,100*l.* entered up against *A.* and *C.* The annuity remained unpaid from January 1823, *A.* having left the country, and in February 1824 *C.* became bankrupt, and afterwards obtained his certificate. *C.* having died, *B.* filed a bill to have the arrears of the annuity paid out of his real and personal estates:—Held, that neither the value of the annuity nor the sum due on the judgment was provable under *C.*'s commission, and therefore that his certificate was not a bar to the plaintiff's demand. *Johnson v. Compton*. 4 Sim. 37.

A. granted an annuity to *B.*, and covenanted to charge, any property that he might become possessed of at his wife's death, either under her will or otherwise, with the payment of the annuity. *A.* became bankrupt, and afterwards obtained his certificate, and then his wife died, having, under a power in her settlement, bequeathed to him an annuity of 700*l.* *A.* was decreed to execute a proper deed to charge the annuity of 700*l.* with payment of the annuity granted to *B.* *Lyde v. Mynn*. 4 Sim. 505.

ANNULLING FIAT.

See also PETITION TO ANNUL.

What affidavit necessary of residence of creditors to annul town fiat and issue a country one. *Ex parte Leonard*. 2 Dea. & Chit. 182.

APPEAL TO LORD CHANCELLOR.

An appeal to the lord chancellor from the Court of Review does not lie, where the point determined is a mere matter of fact; but only where it involves a matter of law or equity, or is connected with the refusal or admission of evidence. Therefore, where the question is merely whether a party is or is not a trader, this is not the subject of an appeal. *Ex parte Hinton*. 2 Dea. & Chit. 407.

An appeal pending is not a sufficient ground for staying proceedings; more especially when it is plain that the appeal is brought for the purpose of delay. *Ex parte Hinton*. 2 Dea. & Chit. 407.

Upon an appeal in bankruptcy the appellant is entitled to begin. *Ex parte Belcher*, 1833. 1 Mont. & B. 286.

If a creditor petition to supersede, or that the assignees be removed, and the supersedeas is refused, but the assignees are removed, upon the petitioner's counsel undertaking that the petitioner should prove, the creditor cannot appeal as to the supersedeas. *Ex parte Green*, 1832. 1 Mont. & B. 90.

APPEARANCE BY COUNSEL.

Where an attestation was in the following form, "signed by the petitioners, *A. B.* and *C. D.*, in the presence of *T. S.* acting as solicitor for *A. T.*, solicitor for the petitioners in this matter," and it appeared that *A. T.* was not a solicitor of this Court; *semble*, nevertheless, that the attestation was good, the petitioners having appeared by counsel. *Ex parte Tanner*, 1833. 2 Dea. & Chit. 563. S. C. 1 M. & B. 390.

APPOINTMENT OF TRUSTEES.

See TRUSTEES.

APPROPRIATION OF PAYMENTS.

Where there was a running cash and bill account between the bankrupt and a banking company, who were under considerable advances to him, but part of these advances arose out of illegal transactions; and the bankrupt from time to time deposited bills and made payments without any specific appropriation, or any settled account between him and the bankers:—Held, that the payments must be appropriated in reduction of the earlier items of the account, and of the legal, and not the illegal, part of the demand. *Ex parte Randleson*, 1832. 2 Dea. & Chit. 534.

ASSIGNOR AND ASSIGNEE.

Where a creditor, after the issuing of the fiat, assigns his debt, this does not give the assignee a right to prove it, but merely a right to call upon the assignor to prove the debt, as a trustee for the assignee. *Ex parte Dickenson*, 1832. 2 Dea. & Chit. 520.

ASSIGNEES.

And see ACTIONS—BANKRUPT TRUSTEE—SHERIFF—TROVER.

Where one of three assignees declines to act; the two acting assignees should join in the petition for a new choice; or, if one only presents the petition, it should be served upon the other acting assignee. *Ex parte Harris.* 2 Dea. & Chit. 4.

Where a creditor addresses a written request to assignees, in general terms, to pay "the dividends made on the bankrupt's estate," to *A. B.*, the assignees are justified in paying subsequent dividends to *A. B.*, until they have notice from the creditor that he has revoked *A. B.*'s authority. *Ex parte Bright.* 2 Dea. & Chit. 8.

The assignees are bound to furnish a creditor, who has proved, with a copy of their accounts, if he offers to pay the expense of making such copy. *Ex parte Aberdeen.* 2 Dea. & Chit. 34.

The petitioner, an equitable mortgagee of leasehold property, obtained an order for a sale, at which £950 was bid for the mortgaged premises, but they were bought in by direction of the assignees. The petitioner afterwards applied to the commissioners for another sale, but the

order they made being unsatisfactory to him as to the time of sale, he refused to accept it; and the assignees afterwards obtained another order, when the highest bidding was only £650:—Held, that the petitioner, by applying for a second sale, waived any claim against the assignees for the difference in the amount of the premises at the first and second sale; but that he was entitled to be indemnified from the ground-rent, and all expenses incurred since the first sale. *Ex parte Baldock.* 2 Dea. & Chit. 60.

Although an audit meeting has closed, and the assignees' accounts are then settled, the commissioner, at any future meeting, has power to examine the assignees as to monies received before and not included in such accounts, and to reinvestigate those accounts generally, if need be. *In re Applegath.* 2 Dea. & Chit. 101.

Upon issuing a renewed country commission, it is the duty of the assignees, or their agent, (the solicitor,) to ascertain whether the commissioners are able and willing to act; otherwise they are liable to the costs of a new fiat, if it be necessary, from inability or unwillingness to act on the part of the commissioners who are named in the renewed fiat. *Re Wilkinson.* 2 Dea. & Chit. 112.

Where order of Court is necessary to enable a party to prove, he cannot vote or sign certificate; for instance, trustees, executors, &c. *Ex parte, Wyatt.* 2 Dea. & Chit. 211.

A., an assignee, purchases, as trustee for *B.*, some shares which the bankrupt had in certain mines, and, after retaining them in that character a twelvemonth, re-purchases them of *B.* for his own use:—Held, that the transaction was void, on the general principle that an assignee cannot purchase any part of the bankrupt's property, either for himself or another; and that *A.* must be considered a trustee of the shares for the benefit of the general creditors. *Ex parte Grylls.* 2 Dea. & Chit. 290.

Where an equitable mortgagee is also an assignee, a solicitor will be appointed to take the account, and conduct the sale. *Ex parte Lees.* 2 Dea. & Chit. 360.

Where the assignees refuse to bring an action for the recovery of property, which a creditor alleges to have belonged to the bankrupt, the Court will not order a new election of assignees, but will permit the creditor to bring the action in the name of the assignees, upon entering into a proper indemnity. *Ex parte Ryland.* 2 Dea. & Chit. 392.

The solicitor for the petitioning creditor, on the commission being superseded, writes to the bankrupt, I am ready and hereby offer to allow and pay the costs "incurred by the bankrupt, in petitioning for the supersedeas:"—Held, that the solicitor was personally liable on this undertaking, and that the bankrupt might petition for an order on the solicitor to pay the costs, notwithstanding a subsequent commission had issued against him, under which he had not obtained his certificate; his assignees disclaiming all interest in the matter. *Ex parte Bentley,* 1833. 2 Dea. & Chit. 578.

An assignee was removed and ordered to account. Pending that order, the new assignee petitioned for the taxation of the bill of the solicitors employed by the discharged assignee, and that they might be ordered to account for money charged to have been improperly received by them with the privity of the former assignee:—Held, that the petition was premature, during the pendency of the former order, but the Court retained it under the circumstances, until the result of the pending account was known. *Ex parte Carter,* 1833. 2 Dea. & Chit. 626. See *Stead v. Thornton.* 3 B. & Ad. 357.

The Court will make no order on a

petition of the assignees to sell any portion of the bankrupt's property by private contract, it being a matter in which they must use their own discretion. *Ex parte Hurley*, 1833. 2 Dea. & Chitt. 631.

Although a commissioner has no power, under the 106th section of 6 G. 4. c. 16. to charge the assignees with monies, which, but for their wilful default, they might have received; yet where he charged them with certain sums as received "by themselves or their solicitors," the Court referred it back to him to ascertain the amount which the assignees, or any person for them, had received, or which but for their wilful default might have been received. *Ex parte Keys and Ex parte Weston*, 1833. 2 Dea. & Chit. 633.

A defendant became bankrupt during the examination of witnesses, and a supplemental bill was filed against his assignees:—Held, that the depositions taken after the commission issued, and before the supplemental cause was at issue, could not be read against the assignees. *Hichens v. Congreve*, 1831. 4 Sim. 420.

If a petitioning creditor is assignee and equitable mortgagee, the petition for a sale must be served

on the bankrupt and, a creditor. *Re Parker*, 1833. 1 Mont. & B. 394.

A coachmaker, who was tenant from year to year of certain premises, and had several coaches on hire, became bankrupt, and his assignees entered upon the premises, to keep the coaches in repair in pursuance of the bankrupt's contracts. In August the bankrupt's effects were sold, and the key of the premises delivered to the bankrupt, but the assignees paid the rent up to the Michaelmas following. In an action by the landlord for a quarter's rent due the Christmas following:—Held, that the assignees were liable. *Ansell v. Robson*, 1832. 2 Crompt. & J. 610.

Where the assignee of a bankrupt is removed, and a new one appointed. *Quære*, whether a party having money in his hands, which he received on account of the bankrupt's estate, in the character of agent to the late assignee, be liable in assumpsit for money had and received, to the use of the newly appointed one? But the former assignee being insane when the money was received:—Held, that such receiver was liable at all events; for he could not be the agent of an insane person, and therefore held the property as a mere stranger. *Stead v.*

Thornton, 1832. 3 Barn. & Adol. 357. See *Ex parte Carter*. 2 Dea. & Chit. 626.

Where, in the case of a claim by assignees to goods taken by a sheriff under an execution, a sheriff obtains the benefit of the interpleading act, 1 & 2 Will. 4. c. 58. s. 6. by a rule calling on the plaintiffs in the action, and the assignees to appear and maintain or relinquish their claims thereto, *semble*, the costs of necessary possession by the sheriff will not be allowed; but he will be suffered to withdraw from possession, if the plaintiffs do not appear to the rule. *Quære*, If the Court has power to award such costs. *Field v. Cope*. 2 Tyrw. 458.

ASSIGNMENT,

In Bankruptcy, when Evidence.

Where the bankruptcy of a party is stated in an allegation in an indictment for conspiracy, the assignment cannot be received as evidence in support of such allegation, unless it be proved by the subscribing witness. *Rex v. Pope*, 1832. 5 Car. & P. 208.

In Bankruptcy, what passes.

A. trading in London on his separate account, and at Brazil in partnership with B. and C., under the firm of A. & Co., becomes insolvent, when four of his creditors are appointed inspectors of his

estates, who it was agreed should receive the several consignments and remittances expected from the Brazil house, as trustees for the persons to whom the same might ultimately be found to belong. The Brazil house, ignorant of A.'s insolvency, make various consignments to A., directing him to sell them at certain places abroad, and the proceeds to be placed to the account of the Brazilian house. These goods are accordingly sold under the direction of the inspectors, and the proceeds received by them. At the time of A.'s insolvency, he was under acceptances to the Brazilian house to a larger amount than the value of the consignments; but such acceptances were on a general account, and not on the account of any particular consignment from the foreign house. A. afterwards becomes bankrupt, and a cession of the effects of the Brazilian house is also made to assignees, according to the laws of Brazil:—Held, that the assignees of the Brazilian house, and not the assignees of A. in England, were entitled to the proceeds of those goods. *Ex parte Wucherer*. 2 Dea. & Chit. 27.

W., a horse contractor, lets out a cart-horse on hire to N. & Co. who have it in their possession more than a twelvemonth, and then become

bankrupt :—Held, that it does not pass to their assignees, as being in their reputed ownership. On a petition by the owner for the redelivery of the horse, and a *vivâ voce* examination of witnesses, the bankrupt is an incompetent witness. *Ex parte Wiggins*. 2 Dea. & Ch. 269. S. C. 1 Mont. & B. 168.

A second commission of bankrupt, pending a first, is void, and no rights pass to the assignees under it. *Nelson v. Cherril*, 1 Moore & S. 452. S. C. 8 Bing. 316.

The defendant held premises under a lease from one *J. H.* at a certain rent, and entered into an agreement with one *N.* for the sale of all the household furniture, &c. on the premises, for a certain sum, to be paid by instalments; covenanting, on payment of the whole of the purchase-money, to demise the premises to *N.* for twenty-five years; the lease to contain the like covenants on the part of *N.* as were contained in the lease under which the defendant held. The agreement also contained a covenant that *N.* should in the meantime, and until such lease should be granted, pay the rent and perform all the covenants which would be to be performed by him in case the lease was actually granted; with a power of distress for non-payment of the rent. *N.* was let into immediate possession under this agreement, and paid rent.

The defendant neglecting to satisfy the rent due to the superior landlord, the latter distrained and sold the goods of *N.* :—Held, that the injury resulting to *N.* from the distress, gave a right of action to his assignees appointed under a commission subsequently issued against him. *Hancock v. Coffyn*, 1 Moore & S. 521. S. C. 8 Bing. 358.

By a marriage settlement certain lands were conveyed to the trustees to the use of the husband for life, with power of appointment to male issue, remainder to the trustees to preserve contingent remainders; remainder, in default of appointment, to the sons successively in tail general; remainder to the right heirs of the husband. After the marriage the husband became bankrupt, and his lands were conveyed by the commissioners to his assignees by deeds of bargain and sale, who afterwards sold them, subject to the contingencies in the deed of settlement. The husband afterwards executed a deed of appointment to his son in fee, after the determination of his own life estate :—Held, that the son took no estate under the appointment, but that, after the marriage settlement, he took as estate tail in remainder, expectant on the determination of the life estate of his father. *Badham v. Mee*, 1 Moore & S. 14.

A. being indebted to *B.*, and *B.* to *C.*, *B.* by letter requested *A.* to pay *C.* the balance due to him *B.* and stated that *C.*'s receipt should be a sufficient discharge, *A.* expressed his assent to pay *C.* when the amount of the balance due to *B.* was ascertained. After the balance due to *B.* was ascertained, but before the amount was paid, he became bankrupt:—Held, that his assignees were not entitled to recover the amount from *A.*, but that he was justified in paying it over to *C.* *Crowfoot v. Gurney*, 2 Moore & S. 473. S. C. 9 Bing. 372.

Machinery affixed to the freehold of iron-works is not considered to be within the order and disposition of the bankrupt trader, where, by the custom of the country, when iron-works are let, such articles are furnished by and continue to be the property of the lessor. *Rufford v. Bishop*, 1829. 5 Russ. 346.

A lease was granted to *W.* who afterwards committed an act of bankruptcy, and then executed a deed, stating that his name had been used in the lease in trust for *R.* and declaring the trust accordingly; a bill was filed on behalf of the creditors of *W.* under the commission, claiming the lease as part of his estate; and the Court directed an issue to try whether *W.*'s name was used in the lease as a trustee for *R.*:—Held, that the issue was properly directed. The jury having found

a verdict in the affirmative:—Held, that the declaration of trust was valid, though executed after bankruptcy, and that the lease did not pass to *W.*'s assignees. *Gardner v. Rowe*, 1828. 5 Russ. 258.

A tenant in fee of a cotton mill in which there was a steam-engine, boilers, &c. mortgaged the mill, engine, boilers, &c. to *B.* but remained in possession until his bankruptcy. The entablature plate of the engine, which, however, formed no part of the working apparatus, was fixed to the freehold of the mills, every other part of the engine was secured by bolts and screws, and might be removed without injury to the building:—Held, that the steam-engine was not in the order and disposition of *A.* at his bankruptcy. *Hubbard v. Bagshaw*, 183. 4 Sim. 326.

A tradesman undertook to do work upon an article delivered to him for a person to whom he was indebted, and it was agreed that the work should be paid for in ready money. He afterwards became bankrupt:—Held, that the act 6 Geo. 4. c. 16. s. 50. which provides for the setting off of cross-demands where there has been mutual credit between the bankrupt and a party claiming on his estate,) did not in this case render the assignees liable in trover for refusing to deliver such article to the creditor on his offering to set off

the price of the work against his own demand. *Clarke v. Fell*, 1832. 4 Barn. & Adol. 404.

After the bankruptcy of one of two partners, the solvent partner, thinking the firm capable of paying its debts, continued the business, and paid partnership money into a banker's, to be applied in discharge of running bills of the firm, payable at the bank, and it was so applied:—Held, that this payment having been made bonâ fide, and without any contemplation of bankruptcy by the solvent partner, was valid at law. The assignees and the solvent partner afterwards opened a fresh account at the bank, and paid in 900*l.* to discharge a debt on the old account, which carried interest. The second partner then became bankrupt:—Held, that the assignees of the second could not recover this last sum. *Woodbridge v. Swann*, 1833. 4 Barn. & Adol. 633.

A., who resided at Liverpool, was in the habit of making consignments of goods to *B.* his agent in South America, for sale, on the faith of and against which consignments *A.* drew bills proportioned to their amount, to be paid by the agent out of the proceeds, and the bills were negotiated by the indorsements of *C.*, *A.*'s correspondent in London. Some of the bills so indorsed were refused acceptance

by the agent. *C.*, on receiving information that they had been so dishonoured, requested that *A.* would order his agent, in case he did not pay his, *A.*'s drafts, immediately to hand over to *C.*'s agent such property as he had of *A.*'s, of an equivalent value to the bills that should not be paid by him. *A.* agreed to do so, but became bankrupt before his order to transfer the goods reached South America:—Held, that the bargain between *A.* and *C.* did not operate as a legal or equitable assignment of the property in *A.*'s goods held by *B.* his agent, but that they remained the property of *A.* at the time of his bankruptcy, and passed to his assignees. *Carvalho v. Burn*, 1833. 4 Barn. & Adol. 382.

A. fi. fa. was sued out on a judgment entered up under a warrant of attorney, and the sheriff seized the goods before ten in the forenoon of the 13th August, and sold the same ten days afterwards. On the 13th October following, about noon, a commission issued against the defendant, under which he was declared a bankrupt:—Held, 1st, that the seizure of the goods by the sheriff was a sufficient executing or levying within the meaning of those words in the stat. 6 Geo. 4. c. 16. s. 81; 2dly, that more than two calendar months had elapsed between the execution and the issuing of the commission; 3dly, that

although the execution issued on a judgment entered up in pursuance of a warrant of attorney, yet, having been executed more than two months before the issuing of the commission, it was protected by s. 81, and not taken out of that section by the proviso in sect. 108. *Semble*, that that proviso only applies to executions executed within two calendar months before the issuing of a commission. *Godson v. Sanctuary*, 1832. 4 Barn. & Adol. 255.

If a London banker, having a branch bank at Edinburgh, stops payment in London; and after the stoppage, but before notice, a customer pay to the agent at Edinburgh bank notes and cash, to be remitted to London; and at that time the banker is indebted to the agent, and the agent after the notice, in pursuance of a special direction from the banker, receive money from other agents, for the purpose of forwarding to London; and a fiat issue against the banker, at which period the monies in the hands of the agent are more than sufficient to cover the amount due to him from the banker; but the amount which he had at the time of notice of the stoppage, including the bank notes, was insufficient; and the customer require the agent to return the bank notes, which he does not comply with; and the agent refuse to pay any part of the money to

the assignees; and the Court of Session in Scotland order the agent to pay, without préjudice, the balance of monies, after deducting in the meantime the amount due to him, to the assignees, which he does; and afterwards it appearing clear that he was not entitled to retain any part of the sum which he received from the other agents after notice, he pay to the assignees the difference between the sum paid to the assignees under the order of the Court of Session, and the amount so received from the other agents:—Ordered, that the assignees must refund to the customer the amount paid in by him. Affirmed by L. C. *Ex parte Cunningham*, 1833. 1 Mont. & B. 269.

On the 10th June, 1830, *W. R.* mortgaged by bill of sale to *W. & Co.* the ships *Lady East*, *Pyramus*, and *Sprightly*, then being at sea. The bill of sale contained an assignment of the freight and policies. On the 12th June, the said bill of sale was entered in the book of registry. On the 18th October the *Sprightly* returned to port, and sailed again on the 16th November. On the 7th January, 1831, *W. R.* mortgaged the same ships, freights, and policies to the petitioners by bill of sale, containing a recital of and subject to the first mortgage; on the 11th May, 1831, the said second bill was entered in the book of registry; on the 14th

June *W. R.* became bankrupt; on the same day the *Pyramus* arrived from sea; and on the 15th July, the *Lady East* arrived from sea. On the 21st June both mortgages were indorsed on the certificate of the *Pyramus*; and on the 16th July both mortgages were indorsed on the certificate of the *Lady East*. The *Sprighley* was lost at sea:—Held, that the second mortgage was valid as to the interest in the ships, freights, and policies. *Ex parte Jones*, 1832. 2 Crompt. & J. 513.

ASSIGNMENT OF PROPERTY.

Where a creditor, after the issuing of the fiat, *assigns his debt*, this does not give the assignee a right to prove it, but merely a right to call upon the assignor to prove the debt, as a trustee for the assignee. *Ex parte Dickenson*, 1832. 2 Dea. & Chit. 520.

An equitable mortgagee of two *policies of assurance*, which the bankrupt had effected on his own life, writes to the insurance office, saying, "I am holder of the undermentioned policies," stating the particulars of the policies in question, and inquiring what sum the office would give if they were delivered up to be cancelled:—Held, that this was a sufficient notice to the office of a change of ownership. *Ex parte Stright*. 2 Dea. & Chit. 314. S. C. 1 Mont. 502. See *Ex parte Tennyson*, 1 M. & B. 87.

The assignment of a *policy of insurance*, without notice to the office, does not prevent the operation of the clause of reputed ownership. *Ex parte Tennyson*, 1832. 1 Mont. & B. 67.

A., who resided at Liverpool, was in the habit of making consignments of goods to *B.*, his agent in South America, for sale, on the faith of and against which consignments *A.* drew bills proportioned to their amount to be paid by the agent out of the proceeds, and the bills were negotiated by the indorsements of *C.*, *A.*'s correspondent in London. Some of the bills so indorsed were refused acceptance by the agent. *C.*, on receiving information that they had been so dishonoured, requested that *A.* would order his agent, in case he did not pay his, *A.*'s drafts immediately, to hand over to *C.*'s agent such property as he had of *A.*'s of an equivalent value to the bills that should not be paid by him. *A.* agreed to do so, but became bankrupt before his order to transfer the goods reached South America:—Held, that the bargain between *A.* and *C.* did not operate as a legal or equitable assignment of the property in *A.*'s goods held by *B.*, his agent, but that they remained the property of *A.* at the time of his bankruptcy, and passed to his assignees. *Carvalho v. Burn*, 1833. 4 Barn. & Adol. 382.

A., a ship-owner, assigned to *B.* the freight earned and to be earned by one of his ships, and afterwards chartered her to *C.* for a voyage to *S.* The outward freight was paid to *A.* before the ship sailed. The charter-party afterwards was delivered to *B.* by *A.*'s direction, and *B.* gave notice of the assignment to *C.* Afterwards, but before the ship returned, *A.* became bankrupt:—Held, that the homeward freight was not in *A.*'s order and disposition at his bankruptcy, and therefore that *B.* was entitled to it. *Douglas v. Russell*, 1831. 4 Sim. 524.

A ship-owner assigned fifteen-sixteenths of a ship to his creditor, in trust to sell and retain his debt, and afterwards became bankrupt. The ship was afterwards sold:—Held, that the creditor must bear his proportion of the seamen's wages and other expenses on account of the ship. *Douglas v. Russell*, 1831. 4 Sim. 533.

AUCTION DUTY.

In an action at the suit of the king against an auctioneer, upon the bond given to make returns of sales by auction, held upon demurrer to the surrejoinder, that an estate which has been mortgaged by a person who has become bankrupt, and is sold by auction by direction of the assignees, and with the concurrence

of trustees appointed to sell the estates to discharge incumbrances, &c., or with the consent of the mortgagees, is, by the stat. 6 Geo. 4. c. 16. s. 98. exempt from the auction duty. *Att. Gen. v. Winstanley*, 1831. 5 Bli. N. S. 130.

BANKRUPT.

See also CERTIFICATE—DESCRIPTION OF BANKRUPT.

Court will not, under any circumstance, before hearing, order bankrupt to give security for costs. Motion for it refused, with costs, to be set off against those due from bankrupt. *Ex parte Munk*. 2 Dea. & Ch. 120.

If the bankrupt refuses to join in the conveyance of any part of his estate, the Court will make an order for him to do so, under the 6 Geo. 4. c. 16. s. 78. *Ex parte Jackson*. 2 Dea. & Ch. 458.

A summary application being made against three attornies, jointly, to pay over to the assignees a sum of money which they had received as the bankrupt's solicitors, under an order of the Court of Chancery:—Held, not sustainable, as they were not all collectively attornies of this court. *Quære*, whether such an order would have been made if they had been all attornies of this court. *Ex parte Hicks*, 1833. 2 Dea. & Chit. 573. S. C. 1 M. & B. 256.

The solicitor for the petitioning creditor, on the commission being superseded, writes to the bankrupt, "I am ready and hereby offer to allow and pay the costs" incurred by the bankrupt in petitioning for the supersedeas:"—Held, that the solicitor was personally liable on this undertaking, and that the bankrupt might petition for an order on the solicitor to pay these costs, notwithstanding a subsequent commission had issued against him, under which he had not obtained his certificate, his assignees disclaiming all interest in the matter. *Ex parte Bentley*, 1833. 2 Dea. & Chit. 578.

On the hearing of a petition to reverse the adjudication, the bankrupt is entitled to have copies of the depositions, to enable him fairly to dispute the bankruptcy. *Ex parte Jackson*, 1833. 2 Dea. & Chit. 601. S. C. 1 M. & B. 394.

Costs will not be given against a bankrupt upon petition to annul a fiat. *Ex parte Heath*, 1832. 1 Mont. & B. 116.

The wife of a convicted felon sentenced to transportation beyond seas for the term of fourteen years, but removed to and confined on board one of the hulks in this country, is liable to be made a bankrupt, if she trade on her own

account, although she is in the habit of visiting her husband, and holding communications with him during his confinement. *Ex parte Franks*, 1 Moore & Scott, 1.

A general release by a creditor to a bankrupt is not sufficient to render the bankrupt a competent witness for the creditor, where the result of his testimony would give the creditor a right to prove under the commission. The creditor ought also to give a release to the assignee of all claim on the bankrupt's estate, and the bankrupt ought to release his claim to the surplus. *Perryman v. Steggall*, 8 Bing. 369. S. C. 1 Moore & S. 540.

BANKRUPT'S ALLOWANCE,

Where bankrupt's estate is exactly sufficient to pay 10s. in the pound, he is not entitled to 5 per cent. allowance: and dividend being declared, he cannot claim any allowance out of it. *Ex parte Petheridge*. 2 Dea. & Chit. 137. S. C. 1 M. & B. 161.

One of two assignees admits in the audit paper, previous to a dividend, that a certain sum was reserved by the assignees, applicable to future claims. The bankrupt, on a petition for his allowance after the death of this assignee, is entitled to an inquiry whether any part of that sum ever came to the hands

of the surviving assignee. *Ex parte Coombes.* 2 Dea. & Chit. 319.

BANKRUPT'S COMPETENCY AS WITNESS.

The bankrupt's affidavit in support of the respondent's case is admissible in evidence, notwithstanding he has previously made one in support of the petition. But when the party is dead, who could best have answered such affidavit, the bankrupt's allegations, uncorroborated, will not go for much. *Ex parte Gwynn.* 2 Dea. & Chit. 12.

On a petition by assignees to supersede a commission, the bankrupt's affidavit is admissible to show that the commission was fraudulently concerted. *Ex parte Bellwood.* 2 Dea. & Chit. 37.

W. a horse contractor, lets out a cart horse on hire to *N. and Co.* who have it in their possession more than a twelvemonth, and then became bankrupt: Held, that it does not pass to their assignees, as being in their reputed ownership. On a petition by the owner, for the re-delivery of the horse, and a *viva voce* examination of witnesses, the bankrupt is an incompetent witness. *Ex parte Wiggins.* 2 Dea. & Chit. 269. *S. C.* 1 Mont. & B. 168.

BANKRUPT'S EXAMINATION.

The bankrupt's examination cannot

be read as evidence against a third party who had no power of cross-examining him. Notice of reading also necessary. *Ex parte Arnsby.* 2 Dea. & Chit. 212.

Semble. A bankrupt is bound to disclose his property although an indictment is pending against him for concealing it, &c., and although his answer may tend to criminate him. *Cross, J. dubitante. In re Heath.* 2 Dea. & Chit. 214. *S. C.* 1 M. & B. 184.

A bankrupt is bound to disclose his property, although his answer may tend to convict him of concealing his effects. *In re Feaks.* 2 Dea. & Chit. 226. *S. C.* 1 M. & B. 215.

A bankrupt is bound to answer touching his estate, although his answer may tend to convict him of perjury on a former occasion, and of concealing his effects. *Cross, J. dissent, on the ground of the assignees' motive in putting the question. In re Smith.* 2 Dea. & Chit. 230. *S. C.* 1 M. & B. 203.

Where, from unavoidable accident, the Commissioners are prevented from meeting to take the bankrupt's last examination, the Court will appoint another day for that purpose. *Ex parte Wilson.* 2 Dea. & Chit. 388.

Where a bankrupt has sold goods to a party for a price considerably lower than what he gave for them, the purchaser, when summoned before the Commissioner for examination, is bound to answer the question "to whom did you subsequently sell these goods;" for it materially concerns the estate of the bankrupt, to ascertain whether the sale by him was *bona fide*. *In re Falk*. 2 Dea. & Chit. 415.

BANKRUPT EXECUTOR.

Bankrupt executor ordered to prove against his own estate, and the assignees to pay the dividends into the hands of the Accountant-general, to the credit of a cause pending for the administration of assets. *Ex parte Colman*, 1833. 2 Dea. & Chit. 584.

BANKRUPT'S SURRENDER.

Where a bankrupt omits to surrender within the given time, the Court will, under some circumstances, appoint a fresh meeting to take his surrender. *Ex parte Jeffreys*. 2 Dea. & Chit. 86.

Before the bankrupt petitions to supersede, he must surrender to the fiat, notwithstanding he presents the petition previous to the expiration of the 42 days. *Ex parte Drake*. 2 Dea. & Chit. 91.

Although the adjudication has been reversed, a creditor has no right to the annulling the fiat, even on a petition presented before the 42d day, if up to the hearing of the petition the bankrupt has never surrendered. *Ex parte Clarke*. 2 Dea. & Chit. 194. *S. C.* 1 M. & B. 379.

A bankrupt who had never surrendered, was restrained by order from proceeding in actions against the assignees and a purchaser under the commission, to try its validity, after long acquiescence, and acts of co-operation in the proceedings consequent upon the commission, done by him or under his authority. *Ex parte Hornby*, 1832. 1 Mont. & B. 1.

The Court refused to supersede a commission upon consent, as one of the bankrupts had not surrendered, but superseded as to the bankrupt who had surrendered. *Ex parte Knowlson*, 1833. 1 Mont. & B. 416.

BANKRUPT TRUSTEE.

Where a trustee becomes bankrupt, a new one may be appointed, on petition, without any reference to the master; although the bankrupt had no portion of the trust property in his hands. *Ex parte Buffery*, 1833. 2 Dea. & Chit. 576.

Bankrupt trustee ordered to be removed, and to convey the trust property to a new trustee, under the 79th section of the Bankrupt Act; but no necessity for the assignees to join in the conveyance. *Ex parte Painter*, 1833. 2 Dea. & Chit. 584.

BILLS OF EXCHANGE.

See also ACCOMMODATION BILL—
CROSS BILLS.

A. discounts for *K. & Co.*, who afterwards become bankrupt, three bills drawn by *K. & Co.*, on *D.* and *S.* One of the bills becomes due before the bankruptcy, and the two others afterwards; none of them are paid by the acceptors, and *A.* gives no notice to *K. & Co.* of their dishonour:—Held, that *A.* could not prove the first bill, but might prove the two others. *K. & Co.* also sent to *A.* five other bills drawn by them on *D.* and *S.*, and received from him, in return, his acceptances for the precise amount, which they discounted with their own bankers, but none of which being paid by *A.* (who became bankrupt himself before they fell due) they were proved by the holders under *K. & Co.*'s commission, *A.* having never negotiated the five bills sent him by *K. & Co.*:—Held, that his assignees

could not prove them under *K. & Co.*'s commission. *Ex parte Solarte*. 2 Dea. & Chit. 261.

Where the drawer of a bill of exchange deposits it with a creditor, giving him authority to receive the proceeds, and apply them in a specified way, if the creditor, after an act of bankruptcy by such drawer, gives up the original bill to the acceptor, (taking another bill in lieu of it,) this is a conversion by the creditor, and the assignees of the drawer may support trover. *Robson v. Rolls*. 1 Mood. & R. 238.

BILL-BROKER.

The charge of 10s. per cent. for commission, besides the legal interest on a loan of money, is not usurious, if it is referable to trouble and expense *bond fide* incurred by the lender; although he may not be a banker, or a person engaged in trade; or, although the money lent is his own, and not that of other persons. *Ex parte Gwyn*. 2 Dea. & Chit. 12.

A bill-broker, in order to get a bill discounted at 4 per cent. takes upon himself the responsibility of indorser, and charges his principal 5 per cent. discount, which is the lowest sum at which he could have done the business, except for

his indorsement:—Held, that, although he also charged 10s. per cent. for his trouble, &c., it was not usury, and that he was entitled to do so for his *del credere* commission. *Ex parte Goss.* 2 Dea. & Chit. 240.

BOND.

A bankrupt, previous to his bankruptcy, gave a bond to trustees for the payment of 5000*l.* and interest, as a provision for his daughter on her marriage. The trustees having proved the amount under the commission, a petition was presented to expunge the proof, the bankrupt alleging that, when the bond was given, it was understood between him and the obligees, that it was only to be available in the event of the success of a certain speculation:—Held, that such parol evidence was not admissible to control the absolute effect of the bond. *Ex parte Morley.* 2 Dea. & Chit. 50.

B. and C. being indebted to A., give a joint and several bond. A. takes (as part of the same security) a joint warrant of attorney, and enters up a joint judgment. B. and C. become bankrupt:—Held, that the bond is merged in the judgment, and that A. can only prove against the joint estate of B. and C. *Ex parte Christy.*

2 Dea. & Chit. 155. S. C. 1 M. & B. 352.

CERTIFICATE.

See also MASTERS' CERTIFICATE.

Where the bankrupt's certificate has been stayed at the instance of creditors, who afterwards withdraw their opposition to it, and appear by counsel to consent to its allowance, the Court will allow the certificate, without the usual explanatory affidavit of the absence of collusion. *In re Hall.* 2 Dea. & Chit. 44.

It is no objection to the proof of a debt under a third commission, that the creditor might have proved it under the second commission, under which the bankrupt has obtained his certificate, if the bankrupt has not paid 15s. in the pound under the second commission. *Ex parte Morley.* 2 Dea. & Chit. 45.

Where order of Court is necessary to enable a party to prove, he cannot vote or sign certificate; for instance, trustees, executors, &c. *Ex parte Wyatt.* 2 Dea. & Chit. 211.

A power of attorney from a creditor residing abroad to sign the bankrupt's certificate, is sufficiently authenticated by the attestation of a

notary public, without any affidavit to verify the signature. *Ex parte Myers*. 2 Dea. & Chit. 406.

A power of attorney to sign a bankrupt's certificate, executed by a creditor resident abroad, is sufficiently authenticated, if attested by the British consul. *Ex parte Wilkinson*, 1833. 2 Dea. & Chit. 585. S. C. 1 M. & B. 257.

A. granted an annuity to B., and covenanted to charge any property that he might become possessed of at his wife's death, either under her will or otherwise, with the payment of the annuity. A. became bankrupt, and afterwards obtained his certificate, and then his wife died, having, under a power in her settlement, bequeathed to him an annuity of 700*l*. A. was decreed to execute a proper deed, to charge the annuity of 700*l*. with payment of the annuity granted to B. *Lyde v. Mynn*, 1831. 4 Sim. 505.

An annuity granted by A. to B. was secured by a covenant by C., a surety, to pay the annuity in case A. made default, and by a judgment for 2,100*l*. entered up against A. and C. The annuity remained unpaid from January 1823, A. having left the country; and in February 1824, C. became bankrupt, and afterwards obtained his

certificate. C. having died, B. filed a bill to have the arrears of the annuity paid out of his real and personal estates:—Held, that neither the value of the annuity, nor the sum due on the judgment, was provable under C.'s commission, and therefore, that his certificate was not a bar to the plaintiff's demand. *Johnson v. Compton*, 1830. 4 Sim. 37.

By a discharge under the insolvent debtors' act, debts contracted by the wife of the insolvent *dum sola* are extinguished, and do not revive against her upon the death of the husband. *Lockwood v. Salter*. 2 Nev. & M. 255.

That which is called "the separate property of the wife," consisting of property in which the legal ownership is in others, though held for her benefit, cannot, in a court of law, affect the operation of the discharge of the husband under the insolvent debtors' act, or of his bankruptcy and certificate, in extinguishing the antenuptial debts of the wife. If it could, the existence of such property should be replied specially to a plea setting up such discharge, &c., but would form no objection to such a plea on demurrer. *Ibid.*

A., being a joint surety with B. for C., is compelled to pay the debt

after the bankruptcy of *B.* The certificate of *B.* is no answer to the action of *A.* for contribution. *Clements v. Langley.* 2 Nevile & M. 269.

It is a good answer to a plea of bankruptcy, that the certificate was obtained by fraud, though the enactment to that effect, 5 Geo. 2. c. 30. s. 7. is not repeated in 6 Geo. 4. c. 16. *Horne v. Ion,* 1832. 4 Barn. & Adol. 78.

By 6 Geo. 4. c. 16. s. 127. if a trader has been bankrupt before, and does not pay 15s. in the pound under the second commission, his person only is protected by the certificate, and his future effects vest in the assignees. *Robertson v. Score,* 1832. 2 Barn. & Adol. 350.

The signature, by power of attorney, to a certificate, admitted, although the power was not strictly formal. *Ex parte Wilkinson,* 1833. 1 Mont. & B. 257.

The statute 6 Geo. 4. c. 16. s. 127. which vests in assignees the future effects of a bankrupt, who had before been bankrupt, or taken the benefit of an insolvent act, and has not paid 15s. in the pound under the subsequent commission, does not apply to a bankrupt who had obtained his certificate under such subsequent commission, before that statute passed; and

therefore, where *A.*, after being discharged under an insolvent act, had a commission of bankrupt issued against him, and obtained his certificate before the passing of 6 Geo. 4. c. 16., but did not pay 15s. in the pound, and he was afterwards sued on a bond executed before his discharge under the insolvent act, but not inserted in his schedule:—Held, that his certificate did not bar the action. *Carew v. Edwards,* 1832. 4 Barn. & Adol. 351.

CLAIM.

A sheriff having seized a defendant's goods, against whom a commission of bankrupt had subsequently issued, the goods were claimed by *A. B.* and *C. D.*, the assignees; upon which the sheriff delivers up the goods to them, taking from them a joint bond of indemnity against all loss, charges, &c., which he might sustain by quitting possession and returning *nulla bona*. An action is brought against the sheriff by the execution creditor for a false return, and a verdict returned against him for 800*l.* *A. B.*, one of the co-obligors in the bond, afterwards becomes bankrupt, but before the sheriff had paid the amount of the verdict:—Held, that the sheriff could not as yet prove under this bond, having sustained no actual pecuniary loss; but as the damage was inchoate, he was en-

titled to have a claim entered, with a reservation of dividends. *Ex parte Marshall*, 1833. 2 Dea. & Chit. 589. S. C. 1 M. & B. 242.

COLLUSION.

See also FRAUD.

When the bankrupt's certificate has been stayed at the instance of creditors, who afterwards withdraw their opposition to it, and appear by counsel to consent to its allowance, the Court will allow the certificate, without the usual explanatory affidavit of the absence of collusion. *In re Hall*. 2 Dea. & Chit. 44.

COMMISSIONERS,

Report and Finding.

When the Commissioners find the petitioning creditor's debt insufficient to support the fiat, they should also expressly find, that the debt proposed to be substituted was incurred not anterior to the petitioning creditor's debt. *Ex parte Hunter*, 1832. 2 Dea. & Chit. 507.

Although a Commissioner has no power, under the 106th section of 6 Geo. 4. c. 16. to charge the assignees with monies, which but for their wilful default they might have received; yet where he charged them with certain sums as received "by themselves, or their solici-

tors," the Court referred it back to him to ascertain the amount which the assignees, or any person for them, had received, or which but for their wilful default might have been received. *Ex parte Keys* and *Ex parte Weston*, 1833. 2 Dea. & Chit. 633.

COMMITTAL.

Semble. This Court has no power to commit, on an adjourned examination from before one Commissioner. *In re Heath*. 2 Dea. & Chit. 214. S. C. 1 M. & B. 114.

COMPOSITION.

Time for opening fiat not enlarged, to give effect to arrangement for composition. *Re Moody*. 2 Dea. & Chit. 210.

By a deed of composition entered into by the bankrupt with his creditors, dated 5 September 1831, he agreed to pay them 10s. in the pound by two instalments of 5s. each; in consideration of which the creditors covenanted to release him from his debts, as soon as both instalments were paid. This deed was executed only by the major part of the creditors. After the payment of the first instalment, on the 31st October 1831, a commission issued on an act of bankruptcy committed in June 1831:—Held, that the creditors who had received the first instalment,

were entitled to prove for the residue of their debts, without refunding the amount of the instalment. *Ex parte Wood*, 1832. 2 Dea. & Chit. 508.

COMPROMISE.

Advertisement in Gazette not postponed to give effect to compromise, when commission is not disputed. *Re Hambden*. 2 Dea. & Chit. 209.

CONCERTED COMMISSION.

On a petition by assignees to supersede a commission, the bankrupt's affidavit is admissible to show that the commission was fraudulently concerted. *Ex parte Bellwood*. 2 Dea. & Chit. 37.

The act 1 & 2 Will. 4. c. 53. s. 42. does not give validity to commissions of bankrupt founded on concerted acts of bankruptcy; and, therefore, the execution of a deed, whereby a trader assigns all his property to a trustee for the benefit of all his creditors, is not an act of bankruptcy sufficient to support a commission, founded on the petition of a creditor who was either party or privy to such deed. *Marshall v. Barkworth*, 1833. 4 Barn. & Adol. 508.

Though a concerted commission or fiat in bankruptcy is protected by 1 & 2 Will. 4. c. 56. s. 42. a con-

certed act of bankruptcy is still a nullity. *Marshall v. Barkworth*. 1 Nevile & M. 279.

CONCORDAT.

Where parties have become bankrupt in France, but have been reinstated in their affairs by a concordat, it is not necessary in an action brought by them for money due to them before their bankruptcy, to prove that they have performed their part of the concordat; but they should show, that the action is brought with the assent of the Commissioners named therein. *Orr v. Browne*, 1833. 5 Car. & P. 414.

CONDITIONAL ORDER.

See ORDER, SPECIAL AND CONDITIONAL.

CONDUCT OF SALE.

See also SALE.

Where an equitable mortgagee is also an assignee, a solicitor will be appointed to take the account, and conduct the sale. *Ex parte Lees*. 2 Dea. & Chit. 360.

CONSENT.

Where all creditors consent to a supersedeas, except A., who is abroad, and B. holds a power of attorney from A., authorizing him to consent:—Held, that B. was entitled to consent; and an attested copy of the power was or-

dered to be filed with the proceedings. *Ex parte Hamilton*. 2 Dea. & Chit. 139.

The publication of the advertisement of a bankruptcy will not be postponed, although a large majority of the creditors consent. *Ex parte Ruffenstein*, 1832. 1 Mont. & B. 84.

Upon supersedeas by consent, a purchaser is entitled to be indemnified against judgments outstanding before the bankruptcy. *Ex parte Lautour*, 1832. 1 Mont. & B. 89.

Consent of official assignee to supersedeas, upon consent of creditors, not necessary. *Ex parte Parker*, 1833. 1 Mont. & B. 412.

CONSIDERATION.

The giving up of a business, in consideration of an annuity, is not such a consideration as can be valued under the 6 Geo. 4. c. 16. s. 54.; that section being confined to money considerations. *Ex parte Saxe*. 2 Dea. & Chit. 172. S. C. 1 M. & B. 134.

CONSOLIDATION OF ESTATES.

Where the joint and separate creditors, at a meeting duly convened for that purpose, agree to consolidate the two estates, the Court will refer it to the Commissioner

to inquire, whether such consolidation is for the general benefit; but will not, upon such a resolution alone, bind the interests of the absent creditors of both classes. *Ex parte Part*. 2 Dea. & Chit. 1.

Joint and separate estates are not consolidated, when it is practicable to keep them separate. *Ex parte Sheppard*, 1833. 1 Mont. & B. 415.

CONSPIRACY.

See INDICTMENT.

CONTEMPT.

Where a former petition of the bankrupt was by the Vice-Chancellor dismissed on the merits, with costs to be paid by the bankrupt,—who continues in contempt for non-payment of them,—he has no *locus standi* in this Court, being considered in contempt of this Court also; and former decision on same matter held an estoppel. *Ex parte Munk*. 2 Dea. & Chit. 120.

CONTINGENT DEBT.

A sheriff having seized a defendant's goods, against whom a commission of bankrupt had subsequently issued, the goods were claimed by *A. B.* and *C. D.* the assignees; upon which the sheriff delivers up the goods to them, taking from them a joint bond of indemnity against all loss, charges, &c. which

he might sustain by quitting possession and returning *nulla bona*. An action is brought against the sheriff by the execution creditor for a false return, and a verdict returned against him for 800*l*. *A. B.*, one of the co-obligors in the bond, afterwards becomes bankrupt, but before the sheriff had paid the amount of the verdict:—Held, that the sheriff could not as yet prove under this bond, having sustained no actual pecuniary loss; but as the damage was inchoate, he was entitled to have a claim entered, with a reservation of dividends. *Ex parte Marshall*, 1833. 2 Dea. & Chit. 589. *S. C.* 1 M. & B. 242.

W. S. by settlement made on his marriage covenanted that his executors should, within twelve months after his decease, pay to his wife's trustee 4000*l*. with interest from the time of his death, in trust to pay the interest to the wife for her life, in case she survived him, and after her death the principal to be divided between the children of the marriage; and, if they had no child or children, to the survivor of them, *W. S.* and his wife, his or her executors, &c. *W. S.* became bankrupt, the wife being still alive:—Held, that the covenant to pay the 4000*l*. was a debt payable upon a contingency, and that the operation of the statute 56.; and that

the valuation should be the present worth of 4000*l*., payable twelve months after the death of the bankrupt. *Ex parte Tindal*. 1 Moc & Scott, 607. *S. C.* Mont. 51462.

CONTRACT.

A bankrupt, while in partnership with *K.*, deposits a lease with a creditor, and the partnership is afterwards dissolved, when certain arrangements are made between the bankrupt and the solvent partner. Held, that no subsequent arrangement of this kind will affect the rights of the creditor under the original deposit, and that he is entitled to the usual order for the sale of the property. *Ex parte Booth*, 2 Dea. & Ch. 59.

C. & Co., before their bankruptcy guaranteed to *A.* the payment of 300*l*. for the erection by him of a sugar-mill for *D.*, on the production of a certificate by an engineer that the mill was erected according to the terms of a certain specification. *A.* produces a certificate of the erection of the mill, stating, however, a deviation from the original plan, with the consent of *D.*; upon which *C. & Co.*, without making any objection to such deviation, informed *A.* it was in their power to pay the money:—Held, that *A.* might prove the 300*l*. under the fiat issued against *C. & Co.* *Ex parte Astwell*. 2 Dea. & Ch. 281.

citor), to ascertain whether the Commissioners are able and willing to act; otherwise they are liable to the costs of a new fiat, if it be necessary, from the inability or unwillingness to act on the part of the Commissioners who are named in the renewed fiat. *Re Wilkinson*. 2 Dea. & Ch. 112.

Where an equitable deposit is made, accompanied with a memorandum, for a debt, subsequently discharged; and on a fresh debt contracted, it is verbally agreed that the deposit shall continue as security for the latter debt; the mortgagee is not entitled to the costs out of the produce of the sale. *Ex parte Pigeon*. 2 Dea. & Ch. 118.

Where an order made in bankruptcy reserves further directions and costs, a subsequent application to the Court, as to the costs merely, may be entertained by motion; but if it is by way of further directions, it must be by petition. The solicitor for the respondents ought to have notice of such an application, as well as the respondents themselves. *Ex parte Shadbolt*. 2 Dea. & Ch. 286.

Where affidavits in support of a petition are very voluminous, the Court will give respondent time to answer them, upon payment of costs, although the petition is in the paper for hearing, and twelve days

have elapsed since the affidavits were filed. *Ex parte Williamson*. 2 Dea. & Ch. 317.

When an order has been made for the taxation of the solicitor's bill of costs, *semble*, that a subsequent petition for the costs of the taxation cannot be heard, until the master has made his certificate, nor unless the original petition is also set down in the paper. *Ex parte Elsee*. 2 Dea. & Ch. 332.

The rule that no petition for rehearing is allowed for costs only, does not apply (*come semble*) to a petition for a rehearing, on the ground of an erroneous decision on the merits, although the material effect of such decision may be to render the party liable to costs. *Ex parte White*. 2 Dea. & Ch. 334.

Where a fiat is annulled after adjudication, for an insufficient act of bankruptcy; it is always at the cost of the petitioning creditor. *Ex parte Fletcher*. 2 Dea. & Ch. 374.

Semble, that when a petitioner obtains a conditional order of the Court, he is bound to prosecute such order, under the peril of paying costs to the other party. *Ex parte Austen*. 2 Dea. & Chit. 384.

Costs of the application to substitute another debt for the debt of the

petitioning creditor, ordered to be paid by the petitioning creditor. *Ex parte Lloyd*, 1832. 2 Dea. & Chit. 506.

The costs of proceedings in this Court, under a London fiat, are to be referred to the deputy registrar for taxation; the duty of the Commissioner being merely to tax the petitioning creditor's costs, and the costs of the assignees. *Ex parte Reay*, 1833. 2 Dea. & Chit. 586.

A petition cannot be reheard to vary a former order merely as to costs; more especially when that order was made a twelvemonth ago, and was drawn up by the very parties who apply to vary it. *Ex parte Burnell*, 1833. 2 Dea. & Chit. 640.

In an action by the assignees of a bankrupt, the defendant gave notice of his intention to dispute the petitioning creditor's debt, the trading, and the act of bankruptcy. At the trial, the cause was referred to arbitration, the defendant undertaking to admit before the arbitrator the debt, trading, and act of bankruptcy:—Held, that the judge had no power to certify for the costs occasioned by the notice, under 6 Geo. 4. c. 16. s. 90., the cause not having been actually tried by him. *Barthrop v. Anderson*. 1 Moore & Scott, 361. S. C. 8 Bing. 268.

In an action on an attorney's bill by the assignees of the attorney, who had become bankrupt, an order for taxing the bill was obtained, on an undertaking to pay the amount taxed, with the costs of the action, more than one-sixth of the bill having been disallowed:—Held, that the costs of taxation could not be allowed to the plaintiff as costs in the action. *Featherstonhaugh v. Reen*. 1 Crompt. & M. 495.

The Court will not grant a rule for the taxation of an attorney's bill of costs, at the instance of a third party, who makes the application simply for the collateral purpose of reducing the bill so low as to make him a bad petitioning creditor. *Clutterbuck v. Coombs*. 1 Neville & Mann. 209.

Upon an affidavit being taken off the file for scandal, the solicitor who filed it is liable for all costs and expenses as between solicitor and client. *Ex parte Wake*, 1833. 1 Mont. & B. 259.

Costs against solicitor for improper petition. *Ex parte Williamson*, 1833. 1 Mont. & B. 266.

If a solicitor refuses to deliver the proceedings to the assignees, the order is, of course, with costs. *Ex parte Crowe*, 1832. 1 Mont. & B. 90.

Costs will not be given against a bankrupt, upon petition to annul a fiat. *Ex parte Heath*, 1832. 1 Mont. & B. 116.

COVENANT IN DEED.

A bankrupt, previous to his bankruptcy, gave a bond to trustees for the payment of 5000*l.* and interest, as a provision for his daughter on her marriage. The trustees having proved the amount under the commission, a petition was presented to expunge the proof, the bankrupt alleging, that when the bond was given, it was understood between him and the obligees, that it was only to be available in the event of the success of a certain speculation:—Held, that such parol evidence was not admissible to control the absolute effect of the bond. *Ex parte Morley*. 2 Dea. & Chit. 50.

CREDITORS.

See also CONSENT—DEBTOR AND CREDITOR.

The assignees are bound to furnish a creditor, who has proved, with a copy of their accounts, if he offers to pay the expense of making such copy. *Ex parte Aberdeen*. 2 Dea. & Chit. 34.

Although the adjudication has been reversed, a creditor has no right to the annulling the fiat, even on a petition presented before the 42d

day, if, up to the hearing of the petition, the bankrupt has never surrendered. *Ex parte Clarke*. 2 Dea. & Chit. 194. S. C. 1 Mont. & B. 379.

A special order had been obtained for an agent to the petitioner, who was abroad, to sign the petition on her behalf:—Held, that this might be done, under the general order of 12 August 1809; and the special order was therefore discharged with costs. *Ex parte Moore*. 2 Dea. & Chit. 369.

Where the assignees refuse to bring an action for the recovery of property, which a creditor alleges to have belonged to the bankrupt, the Court will not order a new election of assignees, but will permit the creditor to bring the action in the name of the assignees, upon entering into a proper indemnity. *Ex parte Ryland*. 2 Dea. & Chit. 392.

Where the bankrupt is ready to pay all his creditors in full, and the only creditor whose consent is wanting to the supersedeas is abroad, the bankrupt may apply to pay the amount of that creditor's debt into Court, in order to prevent any delay in obtaining the supersedeas. *Ex parte Hamilton*, 1832. 2 Dea. & Chit. 519.

CROSS BILLS OF EXCHANGE.

And see BILLS OF EXCHANGE.

Where part of the account between two mercantile houses, which became bankrupt, consists of bills, that may be proved against both estates, there can be no proof in respect of those bills, as between the two houses, unless there is a surplus after satisfying the holders of the bills. *Ex parte La Forest*. 2 Dea. & Chit. 199. S. C. 1 M. & B. 363.

A. discounts for *K. & Co.*, who afterwards become bankrupt, three bills drawn by *K. & Co.* on *D.* and *S.*; one of the bills becomes due before the bankruptcy, and the two others afterwards; none of them are paid by the acceptors, and *A.* gives no notice to *K. & Co.* of their dishonour:—Held, that *A.* could not prove the first bill, but might prove the two others. *K. & Co.* also sent to *A.* five other bills drawn by them on *D.* and *S.*, and received from him, in return, his acceptances for the precise amount, which they discounted with their own bankers; but none of which being paid by *A.* (who became bankrupt himself before they fell due) they were proved by the holders under *K. & Co.*'s commission, *A.* having never negotiated the five bills sent him by *K. & Co.*:—Held, that his assignees could not prove them

under *K. & Co.*'s commission. *Ex parte Solarte*. 2 Dea. & Chit. 261.

CUSTOM.

Machinery affixed to the freehold of iron-works, is not considered to be within the order and disposition of the bankrupt trader, where, by the custom of the country, when iron-works are let, such articles are furnished by and continue to be the property of the lessor. *Rufford v. Bishop*, 1829. 5 Russ. 346.

DEBTS.

See also CONTINGENT DEBTS.

After the bankruptcy of one of two partners, the solvent partner, thinking the firm capable of paying its debts, continued the business, and paid partnership money into a banker's, to be applied in discharge of running bills of the firm, payable at the bank; and it was so applied:—Held, that this payment, having been made *bond fide*, and without any contemplation of bankruptcy by the solvent partner, was valid at law. The assignees and the solvent partner afterwards opened a fresh account at the bank, and paid in 900*l.*, to discharge a debt on the old account, which carried interest. The second partner then became bankrupt:—Held, that the assignees of the two could not recover this last sum. *Woodbridge v. Swann*, 1833. 4 Barn. & Adol. 633.

Where a debt is assigned, unless notice be given to the debtor, the assignor must be considered as continuing (within the purview of the bankrupt acts) to have the order and disposition of the debt, until notice to the debtor of the assignment. So, where one of two joint creditors releases his interest to his companion. *Dean v. James*. 1 Nevile & M. 392.

DEBTS PROVEABLE UNDER COMMISSION.

See also PROOF.

By 6 Geo. 4. c. 16. s. 126., a certified bankrupt may plead his bankruptcy to any action for a debt, which was proveable under the commission. *Robertson v. Score*, 1832. 3 Barn. & Adol. 338.

Semble, that s. 127 extends to cases where the former bankruptcy and certificate were anterior to the statute: but held, that that section, where applicable, does not entitle a creditor to proceed against the bankrupt after a second certificate, for a debt which he might have proved under the commission. *Ibid*.

DEBTOR AND CREDITOR.

See also CREDITOR.

Where there was a running cash and bill account between the bankrupt

and a banking company, who were under considerable advances to him, but part of these advances arose out of illegal transactions; and the bankrupt, from time to time, deposited bills, and made payments, without any specific appropriation, or any settled account between him and the bankers:—Held, that the payments must be appropriated in reduction of the earlier items of the account, and of the legal, and not the illegal, part of the demand. *Ex parte Randleson*, 1832. 2 Dea. & Chit. 534.

A ship-owner assigned $\frac{1}{8}$ ths of a ship to his creditor, in trust to sell and retain his debts, and afterwards became bankrupt. The ship was afterwards sold:—Held, that the creditor must bear his proportion of the seamen's wages and other expenses on account of the ship. *Douglas v. Russell*, 1831. 4 Sim. 533.

DECLARATION OF TRUST, AFTER BANKRUPTCY.

A lease was granted to W., who afterwards committed an act of bankruptcy, and then executed a deed, stating that his name had been used in the lease in trust for R., and declaring the trust accordingly: a bill was filed on behalf of the creditors of W. under the commission, claiming the lease as part of his estate; and

the Court directed an issue to try whether *W.*'s name was used in the lease as a trustee for *R.*:—Held, that the issue was properly directed. The jury having found a verdict in the affirmative:—Held, also, that the declaration of trust was valid, though executed after bankruptcy, and that the lease did not pass to *W.*'s assignees. *Gardner v. Rowe*, 1828. 5 Russ. 258.

DEL CREDERE COMMISSION.

A bill-broker, in order to get a bill discounted at 4 per cent., takes upon himself the responsibility of indorser, and charges his principal 5 per cent. discount, which is the lowest sum at which he could have done the business, except for his indorsement:—Held that, although he also charged 10s. per cent. for his trouble, &c. it was not usury, and that he was entitled to do so for his *del credere* commission. *Ex parte Goss*. 2 Dea. & Chit. 240.

DELIVERY UP OF PROPERTY.

See RESTITUTION.

DELIVERY UP OF PROCEEDINGS.

Order made on the solicitor to deliver up the proceedings, and pay over monies to the assignees. *Ex parte Hudson*, 1832. 2 Dea. & Chit. 507.

If a solicitor refuses to deliver the proceedings to the assignee, the order is, of course, with costs. *Ex parte Crowe*, 1832. 1 Mont. & B. 90.

DESCRIPTION OF BANKRUPT.

A commission issues against a man by the name of "*Wicks*," under which name he traded and contracted debts, although "*Knor*" was his real name. Two years afterwards, and before the bankrupt had passed his last examination under the commission, a fiat is issued against him by his right name. The commission was preferred to the subsequent fiat. *Ex parte Sambourne*, 2 Dea. & Ch. 22.

A country attorney hires a room in Bell Court, Brooks' Market, London, which he keeps four weeks, and in which he puts eighty-two old volumes of books, sticking up a paper in the window in which his name was written, with the addition of "bookseller." A fiat, having been issued against him by this description, was annulled, on the ground of fraud. *Ex parte Dart*, 1833. 2 Dea. & Chit. 543.

Where a bankrupt, who had been for some time previously living in Brompton Square, was described in the fiat "of Arundel Street, in the county of Middlesex," where he had taken temporary lodgings only four days before the issuing

of the fiat, the fiat was superseded, on the ground of misdescription. *Ex parte Tanner*, 1833. 2 Dea. & Chit. 563. S. C. 1 M. & B. 390.

DISCHARGE FROM CUSTODY.

Upon an application by a prisoner to be discharged from an illegal arrest, the Court cannot impose terms, or order the costs to be paid out of the estate. *Ex parte Helsby*, 1832. 1 Mont. & B. 79.

DISCLAIMER.

The solicitor for the petitioning creditor, on the commission being superseded, writes to the bankrupt, "I am ready and hereby offer to allow and pay the costs" incurred by the bankrupt in petitioning for the supersedeas:—Held, that the solicitor was personally liable on this undertaking, and that the bankrupt might petition for an order on the solicitor to pay the costs, notwithstanding a subsequent commission had issued against him, under which he had not obtained his certificate; his assignees disclaiming all interest in the matter. *Ex parte Bentley*, 1833. 2 Dea. & Chit. 578.

DISTRESS.

J. S., a bankrupt, received from his assignees the following memorandum: "Mr. *J. S.* having completed an arrangement with Messrs. *H. & Co.* his assignees, for the five

houses in Chequer Alley, and the arrears of rent thereon, the tenants on the respective premises are hereby authorized to pay their rents to the said *J. S.*, whose receipts shall be their discharge:"—Held, that this memorandum gave *J. S.* no authority to distrain in the name of the assignees. *Ward v. Shew*. 2 Moore & S. 756.

A landlord, who has distrained the goods of a tenant, who being arrested after the distress goes to gaol, and petitions the Insolvent Debtors' Court, before the goods are sold, is entitled to the whole of the rent due, and is not restricted to one year's rent. *Wray v. Earl of Egremont*. 1 Nevile & M. 188.

DIVIDEND.

Where a creditor addresses a written request to assignees, in general terms, to pay "the dividends made on the bankrupt's estate" to *A. B.*; the assignees are justified in paying subsequent dividends to *A. B.*, until they have notice from the creditor that he has revoked *A. B.*'s authority. *Ex parte Bright*. 2 Dea. & Ch. 8.

If an application for payment of a dividend is not made, until after the statute of limitations has run. Q. if not lapsed. *Ex parte Bruger*, 1833. 1 Mont. & B. 415.

A. and *B.* entered into partnership as

brewers, *A.* bringing in, as his share, of the capital, a brewhouse and other premises, which were subject to mortgages for debts due by him. *A.* retired from the business, which was continued by *B.* alone, who agreed to take the brewhouse, &c. at a valuation, but the amount was not to be paid till the mortgages were satisfied. *B.* becomes bankrupt, and the mortgage debts remaining unpaid, his assignees, before any proof made in respect of *A.*'s debt, paid off the mortgages:—Held, that the assignees were entitled to deduct the sums paid by them, from the dividends on the sum which was due to *A.* from *B.* at the time of his bankruptcy. *Rowe v. Anderson*, 1831. 4 Sim. 267.

DOUBLE PROOF.

B. and *G.* carry on business at Manchester, under the firm of *Thomas B. & Co.*; *G.* also carries on a separate business at Stockport, under the firm of *G. & Co.* and is likewise a partner with *J.* in another business in London, under the firm of *Thomas J. & Co.*, and in another business at Stockport, under the firm of *S. R.* The firms of *Thomas B. & Co.* and *G. & Co.* became bankrupt:—Held, that the holders of a bill drawn by *Thomas B. & Co.* on *Thomas J. & Co.* and indorsed by *G. & Co.* and *S. R.*, were not entitled to prove it against the joint estate of *B.* and *G.*, and also

against the separate estate of *G.*, but must elect; notwithstanding they were ignorant, that *G.* was a partner in the firm of *Thomas B. & Co.* *Ex parte Moulton*. 2 Dea. & Ch. 419. S. C. 1 Mont. & Bli. 28.

EFFECT OF BANKRUPTCY.

A defendant became bankrupt during the examination of witnesses, and a supplemental bill was filed against his assignees:—Held, that the depositions taken after the commission issued, and before the supplemental cause was at issue, could not be read against the assignees. *Hitchens v. Congreve*, 1831. 4 Sim. 420.

EFFECT OF CERTIFICATE.

See CERTIFICATE.

ELECTION.

Where a bankrupt petitions to supersede, and at the same time brings an action against the petitioning creditor to try the validity of the fiat, he must elect which remedy he will pursue. *Ex parte Drake*, 2 Dea. & Ch. 91.

The two trustees under the marriage settlement of *H.*, a bankrupt, advance him, on the security of his bond, the amount of the trust fund, (which was his wife's fortune,) for the purpose of being employed in his business: and one of the trus-

tees afterwards enters into a parol agreement with *H.* and his partner, that the loan should be considered a debt due from the partnership:—Held, that this subsequent agreement was in the nature of a collateral security, and that the trustees could prove both against the joint estate, and the separate estate of *H.*, making their election afterwards from which estate they would receive dividends. *Ex parte Kedie*, 2 Dea. & Ch. 321.

Where a bankrupt petitions to supersede, and brings an action at the same time to dispute the bankruptcy, the Court declined compelling him to elect which proceeding he would continue; but ordered that the petition should stand over, until the result of the action was known. *Ex parte Chambers*, 2 Dea. & Ch. 372.

By the 49 Geo. 3. c. 121. s. 14. it was enacted, that the proving a debt should be deemed an election by the creditor to take the benefit of the commission. The plaintiff proved a debt under a commission sued out against the defendant, by virtue of that act; and after the passing of the 6 Geo. 4. c. 16. (which repealed the 49 Geo. 3. c. 121.) arrested the defendant for the same debt. The Court directed the defendant to be discharged from custody; holding, that the plaintiff's election to prove under the com-

mission operated as a final abandonment of his claim against the person of his debtor. *Adams v. Bridger*, 1 Moore & S. 438.

EMBEZZLEMENT.

See INDICTMENT.

ENLARGEMENT OF TIME.

Semble, that the period of a month, limited by the statute for presenting the petition of appeal, cannot be extended. *Ex parte Robinson*, 1833. 2 Dea. & Chit. 583.

EQUITY OF REDEMPTION.

Quære, whether a third mortgagee is entitled to his costs of petition to sell, &c. or whether he ought not to apply to the Commissioners, under the general order. *Ex parte Robinson*, 2 Dea. & Ch. 110.

EQUITABLE MORTGAGEE.

A bankrupt, while in partnership with *K.*, deposits a lease with a creditor; and the partnership is afterwards dissolved, when certain arrangements are made between the bankrupt and the solvent partner:—Held, that no subsequent arrangement of this kind will affect the rights of the creditor under the original deposit, and that he is entitled to the usual order for the sale of the property. *Ex parte Booth*. 2 Dea. & Chit. 50.

Although an equitable mortgagee

may waive his privilege to bid, the assignees must still have the conduct of the sale. *Ex parte Smith.* 2 Dea. & Chit. 60.

The petitioner, an equitable mortgagee of leasehold property, obtained an order for a sale, at which 950*l.* was bid for the mortgaged premises, but they were bought in by direction of the assignees. The petitioner afterwards applied to the Commissioners for another sale, but the order they made being unsatisfactory to him, as to the time of sale, he refused to accept it; and the assignees afterwards obtained another order, when the highest bidding was only 650*l.*:—Held, that the petitioner, by applying for a second sale, waived any claim against the assignees for the difference in the amount of the biddings, at the first and second sale; but that he was entitled to be indemnified from the ground-rent, and all expenses incurred since the first sale. *Ex parte Baldock.* 2 Dea. & Chit. 60.

Where equitable deposit is made, accompanied with memorandum, for debt subsequently discharged, and on fresh debt contracted, it is verbally agreed that deposit shall continue as security for the latter debt, mortgagee is not entitled to the costs out of produce of sale. *Ex parte Pidgcon.* 2 Dea. & Chit. 118.

M. & Co. deposit with *S. & Co.* the mortgage deeds of certain colonial property, for securing a floating balance due from *M. & Co.* to *S. & Co.*, and afterwards execute an assignment of the mortgage debt, “in addition to the securities then already held by *S. & Co.*,” but without making any actual assignment of the mortgage itself, or the mortgaged property:—Held, that *S. & Co.* continued nevertheless the equitable mortgagees of the mortgaged property. *Ex parte Smith.* 2 Dea. & Chit. 271.

Where an equitable mortgagee is also an assignee, a solicitor will be appointed to take the account, and conduct the sale. *Ex parte Lees.* 2 Dea. & Chit. 360.

If a petitioning creditor is assignee and equitable mortgagee, the petition for a sale must be served on the bankrupt and a creditor. *Re Parker,* 1833. 1 Mont. & B. 394.

An equitable mortgagee will not be preferred to a subsequent legal mortgagee, who has no notice of the equitable mortgage; and the onus lies upon the former, claiming a priority, to prove that the latter had such notice. *Ex parte Hardy.* 2 Dea. & Chit. 393.

An equitable mortgagee is entitled to the growing crops and rents, from

the date of the order of sale. *Ex parte Bignold*. 2 Dea. & Chit. 398.

ESTOPPEL.

Where former petition of bankrupt was, by the Vice-Chancellor, dismissed on merits, with costs to be paid by the bankrupt, who continues in contempt for non-payment of them, he has no *locus standi* in this Court, being considered in contempt of this Court also. And former decision on same matter held an estoppel. *Ex parte Munk*. 2 Dea. & Chit. 120.

EVIDENCE.

The bankrupt's affidavit in support of the respondent's case is admissible in evidence, notwithstanding he has previously made one in support of the petition. But when the party is dead, who could best have answered such affidavit, the bankrupt's allegations, uncorroborated, will not go for much. *Ex parte Gwyn*. 2 Dea. & Chit. 12.

On a petition by assignees to supersede a commission, the bankrupt's affidavit is admissible, to show that the commission was fraudulently concerted. *Ex parte Bellwood*. 2 Dea. & Chit. 37.

A bankrupt, previous to his bankruptcy, gave a bond to trustees for the payment of 5000*l.* and interest, as a provision for his daughter on her marriage. The

trustees having proved the amount under the commission, a petition was presented to expunge the proof, the bankrupt alleging that when the bond was given it was understood between him and the obligees, that it was only to be available in the event of the success of a certain speculation:—Held, that such parol evidence was not admissible to control the absolute effect of the bond. *Ex parte Morley*. 2 Dea. & Chit. 50.

The bankrupt's examination cannot be read as evidence against a third party who had no power of cross-examining him. Notice of reading also necessary. *Ex parte Arnsby*. 2 Dea. & Chit. 212.

On the hearing of exceptions to the master's report, those affidavits only in support of or against the original petition can be read which were used in evidence before the master. *Ex parte Grylls*. 2 Dea. & Chit. 290.

A banker's pass-book delivered to his customer, in which there are entries on one side only, is not evidence of a settled account between the parties, although the customer keeps the book, without making any objection to the entries contained in it. *Ex parte Randleson*, 1832. 2 Dea. & Chit. 534.

Where the bankruptcy of a party is

stated in an allegation in an indictment for a conspiracy, the assignment cannot be received as evidence in support of such allegation, unless it be proved by the subscribing witness. *Rex v. Pope*, 1832. 5 Car. & P. 208.

The declarations of the petitioning creditor (since dead) made after the commission, are not evidence against the assignees, on the trial of an issue whether the commission was concerted between the petitioning creditor, the bankrupt, and the attorney. *Harwood v. Keys*. 1 Mood. & R. 204.

The declarations of a trader made shortly after an absence, are not admissible to prove such absence an act of bankruptcy. *Lees v. Marton*. 1 Moody & R. 210. See *Ex parte Palmer*. 1 D. & C. 371.

In an action for maliciously suing out a commission of bankrupt, it is not sufficient to prove merely that the commission was superseded: for a supersedeas may proceed upon strict legal grounds, and does not, therefore, furnish evidence of the want of probable cause. *Hay v. Weakley*. 5 Car. & P. 361.

A conversation between a client, who afterwards becomes bankrupt, and his attorney's clerk, on the subject of his affairs, is a privileged communication, and cannot

be given in evidence in an action by his assignees, for the purpose of showing his motives. *Bonman v. Norton*. 5 Car. & P. 177.

Where the bankruptcy of a party is stated in an allegation, in an indictment for a conspiracy, the assignment cannot be received as evidence in support of such allegation, unless it be proved by the subscribing witness. *Rex v. Pope*. 5 Car. & P. 208.

A trader, being pressed for payment of a debt by the attorney of a creditor, promised to give him a security on the following day; instead of which, he left his place of residence, and immediately gave security to another creditor, a relation. On his return home, at the expiration of nearly a month, the attorney of the former creditor, in the course of a conversation, asked him what security he had given his relation; to which he replied, "he did not know":—Held, that the declarations of the debtor in that conversation were admissible in evidence to support an alleged act of bankruptcy in giving the securities to his relation, by way of fraudulent preference, and to show the conduct of the party giving them; although it was objected that the conversation took place in the absence of the person to whom the securities were given, and at too great a

distance of time (a month) from the completion of that transaction. *Rydley v. Gyde.* 3 Moore & Scott, 448. S. C. 9 Bing. 349.

EVIDENCE TENDING TO CRIMINATE.

Semble. A bankrupt is bound to disclose his property, although an indictment is pending against him for concealing it, &c.; and although his answer may tend to criminate him. *Cross, J. dubitante, In re Heath.* 2 Dea. & Chit. 214. S. C. 1 M. & B. 184.

A bankrupt is bound to disclose his property, although his answer may tend to convict him of concealing his effects. *In re Feaks.* 2 Dea. & Chit. 226. S. C. 1 M. & B. 215.

A bankrupt is bound to answer touching his estate, although his answer may tend to convict him of perjury on a former occasion, and of concealing his effects. *Cross, J. dissent., on the ground of the assignee's motive in putting the question. In re Smith.* 2 Dea. & Chit. 230. S. C. 1 M. & B. 203.

Where a bankrupt has sold goods to a party for a price considerably lower than what he gave for them, the purchaser, when summoned before the Commissioner for examination, is bound to answer the

question "to whom did you subsequently sell these goods;" for it materially concerns the estate of the bankrupt, to ascertain whether the sale by him was *bonâ fide*. *In re Falk.* 2 Dea. & Chit. 415.

EXAMINATION.

See BANKRUPT'S EXAMINATION.

If on cross-examining a witness, an irrelevant question be put, you cannot produce evidence to disprove his answer, but must take it for better and worse. *Ex parte Arnsby.* 2 Dea. & Chit. 213.

EXAMINATION, VIVA VOCE.

In the ordinary practice of hearing a petition on affidavit, it is irregular for a counsel to examine a witness *vivâ voce*, without any previous order of the Court obtained for that purpose. *Ex parte Baldock.* 2 Dea. & Chit. 60.

The Court will not order *vivâ voce* examination in first instance before hearing. *Ex parte Arnsby.* 2 Dea. & Chit. 120.

Where a party, on the hearing of a petition, makes use of an affidavit to prove his case, the Court will not, because the affidavit does not go far enough for his purpose, adjourn the hearing of the petition to a future day, to enable him to examine the deponent *vivâ voce*,

unless the other party consent to such adjournment ; for the deponent ought to have been in attendance, if it was likely that his personal examination would be necessary. *Ex parte Dickenson*, 1832. 2 Dea. & Chit. 520.

On the hearing of exceptions to the master's report, those affidavits only in support of or against the original petition can be read which were used in evidence before the master. *Ex parte Grylls*. 2 Dea. & Chit. 290.

When affidavits are referred to the registrar for scandal, and one of the parties means to except to his report, the exceptions must be taken immediately the registrar certifies. *Ex parte Williamson*. 2 Dea. & Chit. 382.

EXECUTION.

See also SHERIFF.

A fi. fa. was sued out on a judgment entered up under a warrant of attorney, and the sheriff seized the goods before ten in the forenoon of the 13th of August, and sold the same ten days afterwards. On the 13th of October following, about noon, a commission issued against the defendant, under which he was declared a bankrupt :— Held, first, that the seizure of the goods by the sheriff was a sufficient executing or levying, within

the meaning of those words in the statute 6 G. 4. c. 16. s. 81. Secondly, that more than two calendar months had elapsed between the execution and the issuing of the commission. Thirdly, that although the execution issued on a judgment entered up in pursuance of a warrant of attorney, yet, having been executed more than two months before the issuing of the commission, it was protected by section 81, and not taken out of that section by the proviso in section 108. *Semble*, that that proviso only applies to executions executed within two calendar months before the issuing of a commission. *Godson v. Sanctuary*, 1832. 4 Barn. & Adol. 255.

EXECUTORS.

See also BANKRUPT EXECUTOR.

Where the bankrupt is one of two executors, the petition of a party interested under the will must be served on the other executor, as well as on the bankrupt and the assignees. *Ex parte Cutting*. 2 Dea. & Chit. 3.

Where an order of Court is necessary to enable a party to prove, he cannot vote or sign certificate ; for instance, trustees, executors, &c. *Ex parte Wyatt*. 2 Dea. & Chit. 211.

J. S. became possessed (in trust, as

executor of his deceased father,) of certain shares of the joint stock of the Lead Smelting Company. The only evidence of a party's interest in the stock of this company is, a book in which are entered all transfers of shares. In this book there was an entry signed by *J. S.* purporting to be a transfer of the shares in question from himself as executor to himself in his individual character. Where the transfer is made in pursuance of a *bond fide* sale for a money consideration, the words "sell and assign" are used; but in this instance those words were erased. On the faith of his apparent ownership of these shares, *J. S.* acted as a director of the company, and received the dividends to his own use up to the time of his bankruptcy; and, on passing his accounts under the commission, he treated the shares as his own property. Upon an issue directed to try the rights to these shares, between *J. S.* and another, as executors of the original proprietor, and the assignees of *J. S.*, it was left to the jury to say whether or not the shares were, at the time of the bankruptcy, in the possession, order, or disposition of the bankrupt with the consent or permission of the true owner. The jury having found for the plaintiffs, the Court refused to disturb the verdict. *Cooper v. De Tastet.* 2 Moore & Scott, 714.

FEME COVERT.

See HUSBAND AND WIFE.

FIAT.

See also CONCERTED COMMISSION.

A country attorney hires a room in Bell Court, Brooks' Market, London, which he keeps four weeks, and in which he puts eighty-two old volumes of books, sticking up a paper in the window on which his name was written with the addition of "bookseller." A fiat having been issued against him by this description, was annulled on the ground of fraud. *Ex parte Dart*, 1833. 2 Dea. & Chit. 543.

Where a fiat is annulled after adjudication, for an insufficient act of bankruptcy, it is always at the cost of the petitioning creditor. *Ex parte Fletcher.* 2 Dea. & Chit. 374.

Although the adjudication has been reversed, a creditor has no right to the annulling the fiat, even on a petition presented before the 42d day, if up to the hearing of petition the bankrupt has never surrendered. *Ex parte Clarke.* 2 Dea. & Chit. 194. S. C. 1 M. & B. 379.

Where a country fiat will be preferred to a London one. *Ex parte Bolan.* 2 Dea. & Chit. 331.

After a fiat had issued, the bank-

rupt makes certain proposals to his creditors to prevent the prosecution of it; to which proposals the solicitor for one of the creditors promises to give an answer at a certain time on the following day, (the 16th after the date of the fiat,) but before that time arrives, he strikes a second docket, for non-prosecution of the first, under the general order:—Held, that this was a breach of faith, and a petition to annul the first fiat was dismissed with costs. *Ex parte Baker*. 2 Dea. & Chit. 362.

Time for opening fiat not enlarged to give effect to arrangement for composition. *Re Moody*. 2 Dea. & Chit. 210.

A fiat may be amended by adding a surname where no proceedings have taken place under it. *In re Dowall*. 1 M. & B. 264.

FINAL EXAMINATION.

See BANKRUPT'S EXAMINATION.

FIXTURES.

L. took a lease of a mill and iron forge, and bought the fixed and moveable implements &c., but it was agreed that they should be delivered up at the end or other determination of the term, at a valuation, if the lessors should give fifteen months' notice of their desire to have them. *L.* afterwards conveyed all his interest in

the premises, implements &c. to a creditor in trust, if default should be made by *L.* in paying certain instalments, to enter upon and sell the same, and satisfy himself out of the proceeds, re-assigning the residue; and if the lessor should require a re-sale of the implements &c. the proceeds of such re-sale were to go in discharge of the debt, if unsatisfied. *L.* made default and subsequently became bankrupt, after which, and during the term, the creditor who had not before interfered entered upon the property:—Held, on trespass brought by the assignees, that *L.* had at the time of his bankruptcy the reputed ownership of the moveable goods, but not of the fixtures. *Clark v. Crownshaw*, 1832. 3 Barn. & Adol. 804.

A tenant in fee of a cotton mill, in which there was a steam-engine, boilers, &c. mortgaged the mill, engine, boilers, &c. to *B.* but remained in possession until his bankruptcy. The entablature plate of the engine, which, however, formed no part of the working apparatus, was fixed to the freehold of the mill, every other part of the engine was secured by bolts and screws, and might be removed without injury to the building:—Held, that the steam-engine was not in the order and disposition of *A.* at his bankruptcy. *Hubbard v. Bagshaw*, 1831. 4 Sim. 326.

Machinery affixed to the freehold of iron-works is not considered to be within the order and disposition of the bankrupt trader, where, by the custom of the country, when iron-works are let, such articles are furnished by and continue to be the property of the lessor. *Rufford v. Bishop*, 1829. 5 Russ. 346.

FORMER DECISION.

Where former petition of bankrupt was by the Vice-Chancellor dismissed on merits, with costs to be paid by the bankrupt, who continues in contempt for non-payment of them, he has no *locus standi* in this Court, being considered in contempt of this Court also. And former decision on same matter held an estoppel. *Ex parte Munk*. 2 Dea. & Chit. 120.

FRAUD.

After a fiat had issued, the bankrupt makes certain proposals to his creditors to prevent the prosecution of it, to which proposals the solicitor for one of the creditors promises to give an answer, at a certain time, on the following day, (the 16th after the date of the fiat,) but before that time arrives he strikes a second docket, for non-prosecution of the first, under the general order:—Held, that this was a breach of faith, and a petition to annul the first fiat was dismissed with costs. *Ex parte Baker*. 2 Dea. & Chit. 362.

After a lapse of twenty years, and the death of the petitioning creditor and the bankrupt, the Court will not entertain a petition for a supersedeas on the ground of fraud. *Ex parte Granger*. 2 Dea. & Chit. 459.

A country attorney hires a room in Bell Court, Brooks' Market, London, which he keeps four weeks, and in which he puts eighty-two old volumes of books, sticking up a paper in the window on which his name was written, with the addition of "bookseller." A fiat having been issued against him by this description, was annulled on the ground of fraud. *Ex parte Dart*, 1833. 2 Dea. & Chit. 543.

A., *B.* and *C.* having agreed for the purchase of certain mines, for 10,000*l.*, and to form a joint stock company for working them, and that the mines should be sold to the company for 25,000*l.*, of which 10,000*l.* should be paid to *F.* the proprietor, and the remainder divided amongst themselves and certain of their friends, whom they nominated to be directors and officers of the company; at a meeting of the persons so nominated, at which *A.*, *B.* and *C.* were present; but before the company was established, it was resolved that the company should purchase the mines for 25,000*l.* to be paid to *F.*; and a conveyance was after-

wards taken from *F.* to the trustees of the company, and the 25,000*l.* was paid out of the funds of the company and distributed in the manner agreed upon. A suit having been instituted by some of the shareholders, on behalf of themselves and the others, against the persons who had participated in the 15,000*l.*, the latter were decreed to refund what they had received, and one of the defendants having become bankrupt after he had paid what he had received into Court, under an order upon motion:—Held, that the plaintiffs were entitled to receive that sum, and were not to be put to prove their demand under the commission. *Hichens v. Congreve*, 1831. 4 Sim. 420.

It is a good answer to a plea of bankruptcy, that the certificate was obtained by fraud, though the enactment to that effect in 5 *Geo.* 2. c. 30. s. 7. is not repeated in 6 *Geo.* 4. c. 16. *Horn v. Ion*, 1832. 4 Barn. & Adol. 78.

FRAUDULENT ASSIGNMENT AND PREFERENCE.

The act 1 & 2 *Will.* 4. c. 53. s. 42. does not give validity to commissions of bankrupt founded on concerted acts of bankruptcy; and therefore the execution of a deed, whereby a trader assigns all his property to a trustee for the benefit of all his creditors, is not

an act of bankruptcy sufficient to support a commission, founded on the petition of a creditor, who was either party or privy to such deed. *Marshall v. Barkworth*, 1833. 4 Barn. & Adol. 508.

A transfer made by a debtor, under apprehension of arrest, is not fraudulent and void, as voluntary, under the Insolvent Debtors' Act, 7 *Geo.* 4. c. 57. s. 32. *Corbould v. Broadhurst*. 1 Mood. & R. 189.

A. received from *B.*, an insolvent, the pawnbroker's duplicate of a harp; which was an undue preference, under section 32 of the insolvent act, 7 *Geo.* 4. c. 57. *A.* took the harp out of pawn:—Held, that as against the assignees *A.* had no lien on the harp for the sum he paid to take it out of pawn. *Ayling v. Williams*, 5 Car. & P. 399.

A trader, being pressed for the payment of a debt by the attorney of a creditor, promised to give him a security on the following day; instead of which he left his place of residence, and immediately afterwards gave securities to another creditor, a relation. On his return home, at the expiration of nearly a month, the attorney of the former creditor, in the course of a conversation, asked him what security he had given his relation; to which he replied "he did not

know :”—Held, that the declarations of the debtor, in that conversation, were admissible in evidence to support an alleged act of bankruptcy, in giving the securities to his relation, by way of fraudulent preference, and to show the conduct of the party giving them ; although it was objected, that the conversation took place in the absence of the person to whom the securities were given, and at too great a distance of time (a month) from the completion of that transaction. *Ridley v. Gyde*. 2 Moore & Scott, 448. S. C. 9 Bing. 349.

The transfer or delivery of goods, &c., by a trader in contemplation of bankruptcy, although in satisfaction of a *bonâ fide* debt, is not within the protection of section 81 of the statute 6 Geo. 4. c. 16. notwithstanding it is made more than two months before the issuing of a commission against such trader. *Bevan v. Nunn*. 2 Moore & Scott, 132. S. C. 9 Bing. 107.

J. S., being indebted to the defendant, the latter wrote to demand payment, saying that he must have the money “in a few weeks,” or he would put it in the hands of an attorney to get. *J. S.*, in consequence of this demand, paid the debt in three weeks, and went to prison, and petitioned the Insolvent Debtors’ Court for his dis-

charge within three months afterwards :—Held, that this was not a voluntary payment, or fraudulent and void, within the meaning of the 32d section of the statute, 7 Geo. 4. c. 57. *Reynard v. Robinson*. 3 Moore & S. 127. S. C. 9 Bing. 717.

One of two partners, after committing an act of bankruptcy, handed over a bank post-bill and some silver to the agent of the drawer of a bill of exchange, accepted by the partners, and which was just about to become due, for the purpose of protecting such bill. Such handing over was found to be a fraudulent preference, and to have been in contemplation of bankruptcy. On the same day, but a few hours later than the time of handing over the note and money, the other partner committed an act of bankruptcy :—Held, that the act of the partner who had committed the act of bankruptcy before he handed over the property was not binding, and that the assignees of the two partners might recover the value of the property. *Burt v. Moul*t. 1 Crompt. & M. 525.

A preference by an insolvent trader to a particular creditor is not fraudulent, if originating *bonâ fide* in the urgency of the creditor. *Morgan v. Brundrett*. 2 Nevile & M. 281.

FREIGHT.

A ship-owner assigned to B. the freight earned and to be earned by one of his ships, and afterwards chartered her to C. for a voyage to S. The outward freight was paid to A. before the ship sailed. The charter-party afterwards was delivered to B., by A.'s direction, and B. gave notice of the assignment to C. Afterwards, but before the ship returned, A. became bankrupt:—Held, that the homeward freight was not in A.'s order and disposition at his bankruptcy; and, therefore, that B. was entitled to it. *Douglas v. Russell*, 1831. 4 Sim. 524.

FRENCH BANKRUPTCY.

Where parties have become bankrupt in France, but have been reinstated in their affairs by a *concordat*, it is not necessary, in an action brought by them for money due to them before their bankruptcy, to prove that they have performed their part of the *concordat*, but they should show that the action is brought with the assent of the Commissioners named therein. *Orr v. Browne*, 1833. 5 Car. & P. 414.

FURTHER DIRECTIONS.

Where an order made in bankruptcy reserves further directions and costs, a subsequent application to the Court, as to the costs merely,

may be entertained by motion, but if it is by way of further directions, it must be by petition. The solicitor for the respondents ought to have notice of such an application as well as the respondents themselves. *Ex parte Shadbolt*. 2 Dea. & Chit. 286.

FURTHER EVIDENCE.

Where a party, on the hearing of a petition, makes use of an affidavit to prove his case, the Court will not, because the affidavit does not go far enough for his purpose, adjourn the hearing of the petition to a future day, to enable him to examine the deponent *viva voce*, unless the other party consents to such adjournment; for the deponent ought to have been in attendance, if it was likely that his personal examination would be necessary. *Ex parte Dickenson*, 1832. 2 Dea. & Chit. 520.

Where the bankrupt, after the choice of assignees, petitions to reverse the adjudication, under the 17th section of 1 & 2 Will. 4. c. 56. the assignees are not prevented from adducing further evidence to establish the act of bankruptcy, upon which the adjudication of the Commissioner proceeded. *Ex parte Jackson*, 1833. 2 Dea. & Chit. 601. S. C. 1 M. & B. 394.

FUTURE EFFECTS.

By section 127, if bankrupt has been

bankrupt before, and does not pay 15s. in the pound under the second commission, his person only is protected by the certificate, and his future effects vest in the assignees. *Robertson v. Score*, 1832. 3 Barn. & Adol. 338.

GENERAL ORDER.

After a fiat had issued, the bankrupt makes certain proposals to his creditors, to prevent the prosecution of it, to which proposals the solicitor for one of the creditors promises to give an answer, at a certain time, on the following day, (the 16th after the date of the fiat,) but before that time arrives, he strikes a second docket, for non-prosecution of the first, under the general order:—Held, that this was a breach of faith, and a petition to annul the first fiat was dismissed with costs. *Ex parte Baker*. 2 Dea. & Chit. 362.

A special order had been obtained for an agent to the petitioner, who was abroad, to sign the petition on her behalf:—Held, that this might be done under the general order of 12th August, 1809, and the special order was therefore discharged with costs. *Ex parte Moore*. 2 Dea. & Chit. 369.

It was ordered that the costs of all proceedings in this Court in town fiats, should be referred to their own officer, Mr. Gregg, the de-

puty registrar for taxation; and that no reference should in future be directed to a master for this purpose. The Commissioners would merely tax the petitioning creditor's costs, and the costs of assignees under the fiat. *Practice*, 1833. 2 Dea. & Chit. 586.

As to special case, it is ordered, that every special case of appeal from this Court, tendered for the approval of one of the judges, shall be left for that purpose at the office of the registrar, signed by the counsel for the respective parties, or accompanied with a certificate from the counsel for the appellant, that there is in their judgment good cause for such appeal, and an affidavit that a copy of such case has been delivered to the solicitor for the other party, eight days prior to such tender thereof. 22d May, 1833. 2 Dea. & Chit. 632.

The 12th new orders, 3d April, 1828, applied to affidavits in bankruptcy, which had been referred for scandal and impertinence. *Ex parte Chester*, 1830. 4 Sim. 12.

GOODS IN TRANSITU.

A., who resided at Liverpool, was in the habit of making consignments of goods to *B.*, his agent in South America, for sale; on the faith of, and against which consignments, *A.* drew bills propo-

tioned to their amount, to be paid by the agent out of the proceeds; and the bills were negotiated by the indorsements of *C.*, *A.*'s correspondent in London. Some of the bills so indorsed were refused acceptance by the agent. *C.*, on receiving information that they had been so dishonoured, requested that *A.* would order his agent, in case he did not pay his, *A.*'s drafts, immediately to hand over to *C.*'s agent such property as he had of *A.*'s of an equivalent value to the bills that should not be paid by him. *A.* agreed to do so, but became bankrupt before his order to transfer the goods reached South America:—Held, that the bargain between *A.* and *C.* did not operate as a legal or equitable assignment of the property in *A.*'s goods, held by *B.*, his agent, but that they remained the property of *A.* at the time of his bankruptcy, and passed to his assignees. *Carvalho v. Burn*, 1833. 4 Barn. & Adol. 382.

GUARANTEE.

In consideration of *A.* allowing *B.* to draw upon him, and accept his drafts, *C.* guarantees to him the payment of the amount of all such acceptances. *C.* becomes bankrupt, when the acceptances are not yet due:—Held, that after the acceptances have become due, and *B.* has neglected to provide for them, *A.* is entitled to prove the amount against *C.*'s estate, under

the 6 Geo. 4. c. 16, s. 56. *Ex parte Myers*. 2 Dea. & Chit. 251. S. C. 1 M. & B. 229.

The solicitor for the petitioning creditor, on the commission being superseded, writes to the bankrupt, "I am ready and hereby offer, to allow and pay the costs," incurred by the bankrupt in petitioning for the supersedeas:—Held, that the solicitor was personally liable on this undertaking, and that the bankrupt might petition for an order on the solicitor to pay these costs, notwithstanding a subsequent commission had issued against him, under which he had not obtained his certificate, his assignees disclaiming all interest in the matter. *Ex parte Bentley*, 1833. 2 Dea. & Chit. 578.

HEARING IN PRIVATE.

See also REHEARING—PETITION.

Quære, Whether the Court of Review has power to hear a case in private, if they think a public hearing will be detrimental to the interests of justice. *In re Chambers*. 2 Dea. & Chit. 395.

HIRE.

W., a horse-contractor, lets out a cart-horse on hire to *N. & Co.*, who have it in their possession more than a twelvemonth, and then become bankrupt:—Held, that it does not pass to their as-

signees, as being in their reputed ownership. On a petition by the owner for the re-delivery of the horse, and a *vivâ voce* examination of witnesses, the bankrupt is an incompetent witness. *Ex parte Wiggins*. 2 Dea. & Chit. 269. S. C. 1 Mont. & B. 168.

HUSBAND AND WIFE.

Where trustees under marriage settlement lend wife's money to husband with her consent, and husband becomes bankrupt, they cannot, on behalf of wife, prove for interest of money, but only for the principal; she having been supported by her husband since marriage, upon the principles applicable to wife's pin-money. *Semble*, secus if they prove to save themselves from consequences of their own act, her consent not having been given. *Ex parte Green*. 2 Dea. & Chit. 113.

The wife of a convicted felon, sentenced to transportation beyond seas for the term of fourteen years, but removed to and confined on board one of the hulks in this country, is liable to be made a bankrupt, if she trade on her own account, although she is in the habit of visiting her husband and holding communications with him during his confinement. *Ex parte Franks*. 1 Moore & Scott, 1.

By a discharge under the insolvent debtors' act, debts contracted by the wife of the insolvent *à son seul* are extinguished, and do not revive against her upon the death of the husband. *Lockwood v. Satter*. 2 Nev. & M. 255.

That which is called "the separate property of the wife," consisting of property in which the legal ownership is in others, though held for her benefit, cannot, in a court of law, affect the operation of the discharge of the husband under the insolvent debtors' act, (or of his bankruptcy and certificate,) in extinguishing the ante-nuptial debts of the wife. If it could, the existence of such property should be replied specially to a plea setting up such discharge, &c. but would form no objection to such plea on demurrer. *Ibid*.

INDEMNITY.

Where the assignees refuse to bring an action for the recovery of property, which a creditor alleges to have belonged to the bankrupt, the Court will not order a new choice of assignees, but will permit the creditor to bring the action in the name of the assignees, upon entering into a proper indemnity. *Ex parte Ryland*. 2 Dea. & Ch. 392.

Upon supersedeas by consent a purchaser is entitled to be indemnified

against judgments outstanding before the bankruptcy. *Ex parte Lautour*, 1832. 1 Mont. & B. 89.

INDEMNITY BOND.

A sheriff having seized a defendant's goods, against whom a commission of bankrupt subsequently issued, the goods are claimed by *A. B.* and *C. D.*, the assignees, upon which the sheriff delivers up the goods to them, taking from them a joint bond of indemnity against all loss, charges, &c., which he might sustain by quitting possession, and returning *nulla bona*. An action is brought against the sheriff by the execution creditor for a false return, and a verdict returned against him for 800*l.* *A. B.*, one of the co-obligors in the bond, afterwards becomes bankrupt, but before the sheriff had paid the amount of the verdict:—Held, that the sheriff could not as yet prove under this bond, having sustained no actual pecuniary loss; but as the damage was inchoate, he was entitled to have a claim entered, with a reservation of dividends. *Ex parte Marshall*, 1833. 2 Dea. & Chit. 589. *S. C.* 1 M. & B. 242.

INDICTMENT.

On a summary application against the assignees for delivery up of goods, seized by them as the pro-

perty of the bankrupt under the fiat, out of the hands of the petitioner (a stranger to the bankruptcy) who claimed the goods as his, but who, together with the bankrupt, had been indicted for a conspiracy in secretly and fraudulently removing the goods, which indictment was still pending:—The Court refused to decide on the petition till after the trial, on the ground that it would tend to disclose the assignees' evidence in support of the indictment. *Ex parte Heath*. 2 Dea. & Ch. 140. *S. C.* 1 M. & B. 169.

Where the bankruptcy of a party is stated in an allegation in an indictment for a conspiracy, the assignment cannot be received as evidence in support of such allegation, unless it be proved by the subscribing witness. *Rex v. Pope*, 1832. 5 Car. & P. 208.

An indictment for a conspiracy to embezzle the goods of a bankrupt must state the trading, petitioning creditor's debt, and the becoming bankrupt. It is not sufficient to state that a commission issued, under which the party was duly found and declared to be a bankrupt. *The King v. Jones*. 1 Nev. & Man. 78.

Indictment, after stating that a commission of bankrupt had issued against *A.*, by virtue of which the

Commissioners adjudged him to be a bankrupt, charged that he and other defendants conspired to conceal a part of his personal estate: Held, that even since the statute 6 Geo. 4. c. 16. s. 112, such an indictment is defective for not showing that the party had actually become bankrupt. *Rex v. Jones*, 1832. 4 Barn. & Adol. 345.

INFANT.

A commission of bankrupt issued against an infant, upon a debt contracted, and an act of bankruptcy committed, during his minority, is absolutely void; and, if the assignees have reason to know that he intends to set up his infancy, it is not necessary for him to give them the notice required by the 90th section of the statute 6 Geo. 4. c. 16., that he intends to dispute the proceedings under the commission. *Belton v. Hodges*. 2 Moore & Scott, 496. S. C. 9 Bing. 365.

INQUIRY.

One of two assignees admits in the audit paper, previous to a dividend, that a certain sum was reserved by the assignees, applicable to future claims. The bankrupt, on a petition for his allowance after the death of this assignee, is entitled to an inquiry whether any part of that sum ever came to the hands of the surviving assignee.

Ex parte Coombs. 2 Dea. & Ch. 319.

INSANITY OF ASSIGNEE.

Where the assignee of a bankrupt is removed, and a new one appointed, *quare*, whether a party having money in his hands which he received on account of the bankrupt's estate, in the character of agent to the late assignee, be liable in assumpsit for money had and received to the use of the newly appointed one? But, the former assignee having been insane when the money was received, held, that such receiver was liable at all events, for he could not be the agent of an insane person, and, therefore, held the property as a mere stranger. *Stead v. Thornton*, 1832. 3 Barn. & Adol. 357.

INSOLVENCY.

The stat. 6 Geo. 4. c. 16. s. 127., which vests in assignees the future effects of a bankrupt who had before been bankrupt, or taken the benefit of an insolvent act, and has not paid 15s. in the pound under the subsequent commission, does not apply to a bankrupt who had obtained his certificate under such subsequent commission before that statute passed; and therefore, where *A.*, after being discharged under an insolvent act, had a commission of bankrupt issued against him, and obtained his certificate

before the passing of 6 Geo. 4. c. 16., but did not pay 15s. in the pound, and he was afterwards sued on a bond executed before his discharge under the Insolvent Act, but not inserted in his schedule, it was held that his certificate did not bar the action. *Carew v. Edwards*, 1832. 4 Barn. & Adol. 351.

INSPECTION OF PROCEEDINGS.

Where the person against whom a fiat is issued applies to the Court for a suspension of the advertisement in the Gazette, and swears positively that he owes no debt to the petitioning creditor, it is not necessary that the Court should inspect the proceedings. *In re Fletcher*. 2 Dea. & Ch. 317.

Where a trader, against whom a fiat issues, swears that he owes no debt to the petitioning creditor, and has committed no act of bankruptcy, the Court will stay the advertisement in the Gazette; *a fortiori*, if there does not appear to be a clear debt and act of bankruptcy on the proceedings. *Ex parte Fletcher*. 2 Dea. & Ch. 327.

INSURANCE OFFICE.

An equitable mortgagee of two policies of assurance, which the bankrupt had effected on his own life, writes to the insurance office, say-

ing, "I am holder of the under-mentioned policies," stating the particulars of the policies in question, and inquiring what sum the office would give if they were delivered up to be cancelled:—Held, that this was a sufficient notice to the office of a change of ownership. *Ex parte Stright*. 2 Dea. & Chit. 314. S. C. 1 Mont. 502.

The assignment of a policy of insurance, without notice to the office, does not prevent the operation of the clause of reputed ownership. *Ex parte Tennyson*, 1832. 1 Mont. & B. 67.

INTEREST.

The charge of 10s. per cent. for commission besides the legal interest, on a loan of money, is not usurious, if it is referable to trouble and expense *bond fide* incurred by the lender; although he may not be a banker, or a person engaged in trade, or although the money lent is his own, and not that of other persons. *Ex parte Gwyn*. 2 Dea. & Chit. 12. See also *Ex parte Goss*. 2 Dea. & Chit. 240.

INTERMEDIATE PROFITS.

An equitable mortgagee is entitled to the growing crops and rents from the date of the order of sale. *Ex parte Bignold*, 2 Dea. & Ch. 398.

IRRELEVANCY.

If, on cross-examining a witness, an irrelevant question be put, you cannot produce evidence to disprove his answer, but must take it for better and worse. *Ex parte Arnsby*, 2 Dea. & Ch. 213.

ISSUE AT LAW.

Where, upon the trial of an issue, to try whether there was a good petitioning creditor's debt, the bankrupt took an objection to the constitution of the debt, which he never alleged in his petition to supersede the commission, and the jury found a verdict against the petitioning creditor, the Court granted a new trial, on the ground of surprise. *Ex parte Christie*, 2 Dea. & Ch. 461.

A lease was granted to *W.* who afterwards committed an act of bankruptcy, and then executed a deed, stating that his name had been used in the lease in trust for *R.* and declaring the trust accordingly; a bill was filed on behalf of the creditors of *W.* under the commission, claiming the lease as part of his estate; and the Court directed an issue to try whether *W.*'s name was used in the lease as a trustee for *R.*:—Held, that the issue was properly directed. The jury having found a verdict in the affirmative:—Held, that the declaration of trust was valid, though executed after bankruptcy, and that the lease did not

pass to *W.*'s assignees. *Gardner v. Rowe*, 1828. 5 Russ. 258.

JOINT STOCK COMPANY.

A., B. and C. having agreed for the purchase of certain mines for 10,000*l.* and to form a joint stock company for working them, and that the mines should be sold to the company for 25,000*l.*, of which 10,000*l.* should be paid to *F.* the proprietor, and the remainder divided amongst themselves and certain of their friends whom they nominated to be directors and officers of the company; at a meeting of the persons so nominated, at which *A., B. and C.* were present, but before the company was established, it was resolved that the company should purchase the mines for 25,000*l.*, to be paid to *F.*, and a conveyance was afterwards taken from *F.* to the trustees of the company, and the 25,000*l.* was paid out of the funds of the company, and distributed in the manner agreed upon. A suit having been instituted by some of the shareholders, on behalf of themselves and the others, against the persons who had participated in the 15,000*l.*, the latter were decreed to refund what they had received; and one of the defendants having become bankrupt after he had paid what he had received into Court, under an order upon motion, Held, that the plaintiffs were entitled to receive the sum, and were not to be put to prove their demand under

the commission. *Hichens v. Congreve*, 1831. 4 Sim. 420.

JOINT STOCK SHARES.

See REPUTED OWNERSHIP.

JOINT AND SEPARATE CREDITORS.

The Court will not order unclaimed dividends to be distributed among the creditors, unless the creditors on whose debts they are payable have ample notice that they have been declared; and more especially when a long period has elapsed before any dividend has been made. *Sem-ble*, that the unclaimed dividends of joint creditors can only go to the joint creditors, and those of separate creditors to the separate creditors. *Ex parte Fedden*. 2 Dea. & Ch. 379.

JOINT ESTATE.

One of two partners on the 4th July commits a secret act of bankruptcy. On the 5th January, the other partner accepts three bills in the name of the partnership firm in favour of one of the creditors of the partnership; all of which bills were ante dated before the 4th January. These bills were afterwards indorsed for a valuable consideration to R., who had no notice of the act of bankruptcy. On the 10th January a joint commission issued against both partners:—Held, that the holder of the bills could not prove them against the joint estate,

as the solvent partner could not bind the joint property by accepting bills after the act of bankruptcy of his co-partner. Costs of both parties out of the estate. *Ex parte Ellis*, 1833. 2 Dea. & Chit. 555. S. C. 1 M. & B. 249.

See also the next Case.

JUDGMENT.

B. and C. being indebted to A. give a joint and several bond. A. takes (as part of the same security) a joint warrant of attorney, and enters up a joint judgment. B. and C. become bankrupt:—Held, that the bond is merged in the judgment, and that A. can only prove against the joint estate of B. and C. *Ex parte Christie*. 2 Dea. & Chit. 155. S. C. 1 M. & B. 352.

A testator indebted on bond devises his real estate to the bankrupt and two other trustees, for payment of his debts. The bond creditor, after the testator's death, brings an action against the bankrupt and the other devisees, and recovers a joint judgment against them:—Held, that he could not prove under the separate commission against the bankrupt, even for the purpose of voting in the choice of assignees. *Ex parte Pearse*. 2 Dea. & Chit. 451.

An annuity granted by A. to B. was secured by a covenant by C., a surety, to pay the annuity in case A. made default, and by a judg-

ment for 2,100*l.* entered up against *A.* and *C.* The annuity remained unpaid from January, 1823, *A.* having left the country, and in February, 1824, *C.* became bankrupt, and afterwards obtained his certificate. *C.* having died, *B.* filed a bill to have the arrears of the annuity paid out of his real and personal estates:—Held, that neither the value of the annuity nor the sum due on the judgment was proveable under *C.*'s commission, and therefore that his certificate was not a bar to the plaintiff's demand. *Johnson v. Compton*, 1830. 4 Sim. 37.

JURISDICTION.

Where the joint and separate creditors, at a meeting duly convened for that purpose, agree to consolidate the two estates, the Court will refer it to the Commissioner to inquire whether such consolidation is for the general benefit; but will not, upon such a resolution alone, bind the interests of the absent creditors of both classes. *Ex parte Part.* 2 Dea. & Chit. 1.

A petition for the sale of property, in respect of which the creditor holds a legal security, will be dismissed with costs. *Ex parte Moore.* 2 Dea. & Chit. 7. See *Ex parte Bacon*, *id.* 181.

Where a petition prayed that the Court would reverse an order of

the Lord Chancellor, and it was objected to for irregularity, on the ground that the Court of Review has no power to reverse such order, the objection was overruled; for though the Court cannot rescind such order, it can intimate its opinion to the Lord Chancellor, who would act accordingly. *Ex parte Anjer.* 2 Dea. & Chit. 67.

Although an audit meeting has closed, and the assignees accounts are then settled, the Commissioner at any future meeting has power to examine the assignees as to monies received before and not included in such accounts, and to re-investigate those accounts generally, if need be. *In re Apple-gath.* 2 Dea. & Chit. 101.

This Court has jurisdiction to order sale of estate legally mortgaged, on application of mortgagee, giving him leave to bid. *Ex parte Bacon.* 2 Dea. & Chit. 181. See *Ex parte Moore*, *id.* 7.

Semble. This Court has no power to commit on an adjourned examination from before one Commissioner. *In re Heath.* 2 Dea. & Chit. 214. S. C. 1 M. & B. 184.

Although the Court has a controlling power in the appointment of an official assignee, by the Commissioner, yet the Court will not interfere, unless the Commissioner has exercised an unsound discre-

tion in the appointment. *Ex parte Bramston*. 2 Dea. & Chit. 375.

Quære. Whether the Court of Review has power to hear a case in private, if they think a public hearing will be detrimental to the interests of justice. *In re Chambers*. 5 Dea. & Chit. 395.

It is not discretionary in the Court of Review to grant a special case where a party is entitled to appeal; but he has a right to it, if his facts are properly stated. *Ex parte Hinton*. 2 Dea. & Chit. 407.

It is reported to have been said by Lord Brougham that the judges of the Court of Review had no power to exercise a discretion as to the suitors right to appeal. (*Ex parte Cunningham*. 1 Mont. & B. 285.) But in *Ex parte Hawley*, 22d November 1833, (*post*, 3 Dea. & Chit.,) Sir G. Rose said that he conceived the above report to be incorrect; and at all events he could not subscribe to such a doctrine: and the other judges concurred in the observation.

A summary application being made against three attornies, to pay over to the assignees a sum of money which they had received as the bankrupt's solicitors under an order of the Court of Chancery:—Held, not sustainable, as they were not all collectively attornies

of this Court. *Quære*, whether such an order would have been made, if they had been all attornies of this Court. *Ex parte Hicks*, 1833. 2 Dea. & Chit. 573. S. C. 1 M. & B. 256.

Where a trustee becomes bankrupt, a new one may be appointed, on petition, without any reference to the master; although the bankrupt had no portion of the trust property in his hands. *Ex parte Buffery*, 1833. 2 Dea. & Chit. 576.

The Court of Review has no jurisdiction to dispense with the signature of the petitioner to a petition of appeal, under the 1 & 2 Will. 4. c. 56. s. 32., the Lord Chancellor being the proper authority to apply to for that purpose. *Ex parte Robinson*, 1833. 2 Dea. & Chit. 583.

An application of the assignees to postpone the sale of mortgaged property, refused, where the mortgagee objects to such postponement. *Ex parte Belcher*, 1833. 2 Dea. & Chit. 587.

The Court will make no order, on a petition of the assignees to sell any portion of the bankrupt's property by private contract; it being a matter in which they must use their own discretion. *Ex parte Hurly*, 1833. 2 Dea. & Chit. 631.

Upon an application by a prisoner to be discharged from an illegal arrest, the Court cannot impose terms, or order the costs to be paid out of the estate. *Ex parte Helsby*, 1833. 1 Mont. & B. 79.

LEASE, COVENANT OF.

L. took a lease of a mill and iron-forge, and bought the fixed and moveable implements, &c., but it was agreed that they should be delivered up at the end or other determination of the term, at a valuation, if the lessors should give 15 months notice of their desire to have them. *L.* afterwards conveyed all his interest in the premises, implements &c., to a creditor, in trust, if default should be made by *L.* in paying certain instalments, to enter upon and sell the same, and satisfy himself out of the proceeds, re-assigning the residue; and if the lessor should require a re-sale of the implements &c., the proceeds of such re-sale were to go in discharge of the debt, if unsatisfied. *L.* made default and subsequently became bankrupt, after which, and during the term, the creditor who had not before interfered entered upon the property:—Held, on trespass brought by the assignees, that *L.* had at the time of his bankruptcy the reputed ownership of the moveable goods, but not of the fixtures. *Clark v. Crownshaw*, 1832. 3 Barn. & Adol. 804.

A coach-maker who was tenant from year to year of certain premises, and had several coaches on hire, became bankrupt, and his assignees entered upon the premises to keep the coaches in repair, in pursuance of the bankrupt's contracts. In August the bankrupt's effects were sold and the key of the premises delivered to the bankrupt, but the assignees paid the rent up to the Michaelmas following. In an action by the landlord for a quarter's rent due the Christmas following:—Held, that the assignees were liable. *Ansell v. Robson*, 1832. 2 Crompt. & J. 610.

LEGAL MORTGAGE.

This Court has jurisdiction to order sale of estate legally mortgaged, on application of mortgagee, giving him leave to bid. *Ex parte Bacon*. 2 Dea. & Chit. 181.

An equitable mortgagee will not be preferred to a subsequent legal mortgagee, who had no notice of the equitable mortgage; and the onus lies upon the former, claiming a priority, to prove that the latter had such notice. *Ex parte Hardy*. 2 Dea. & Chit. 393.

LEGAL SECURITY.

A petition for the sale of property, in respect of which the creditor holds a legal security, will be dismissed with costs. *Ex parte Moore*. 2 Dea. & Chit. 7.

LENGTH OF TIME.

Court will not supersede commission 30 years old, unless all creditors consent. *Ex parte Lupton*. 2 Dea. & Chit. 136.

After a lapse of 20 years, and the death of the petitioning creditor and the bankrupt, the Court will not entertain a petition for a supersedeas, on the ground of fraud. *Ex parte Granger*. 2 Dea. & Chit. 459.

A fiat was sued out on the 7th June by an attorney against his debtor, for the amount of his bill of costs, and the bankrupt was shortly afterwards discharged under the Insolvent Act, having inserted the amount of the attorney's bill in his schedule. The bankrupt passes his last examination, and on the 4th December petitions for an order to tax the attorney's bill, with a view of superseding the fiat, on the ground of the insufficiency of the petitioning creditor's debt:—Held, that the bankrupt could not, after lying by so long, and after his previous admission of the debt, apply for such an order. *Ex parte Gingell*, 1833. 2 Dea. & Chit. 546.

A petition cannot be re-heard to vary a former order merely as to costs; more especially when that order was made a twelvemonth ago, and was drawn up by the

very parties who apply to vary it. *Ex parte Burnell*, 1833. 2 Dea. & Chit. 640.

A bankrupt who had never surrendered, was restrained by order from proceeding in actions against the assignees and a purchaser under the commission, to try its validity, after long acquiescence, and acts of co-operation in the proceedings consequent upon the commission, done by him or under his authority. *Ex parte Hornby*, 1832. 1 Mont. & B. 1.

LIEN.

Official assignee cannot, under 1 & 2 Will. 4. c. 56. s. 22., take bankrupt's money out of the hands of a solicitor, without discharging his lien. *Ex parte Bowden*. 2 Dea. & Chit. 182.

If a London banker, having a branch bank at Edinburgh, stops payment in London; and after the stoppage, but before notice, a customer pay to the agent at the Edinburgh bank notes and cash, to be remitted to London; and at that time the banker is indebted to the agent, and the agent after the notice, in pursuance of a special direction from the banker, receive money from other agents, for the purpose of forwarding to London; and a fiat issue against the banker, at which period the monies in the hands of the agent are more than sufficient to cover the amount due to him from

the banker ; but the amount which he had at the time of notice of the stoppage, including the bank notes, was insufficient ; and the customer require the agent to return the bank notes, which he does not comply with ; and the agent refuse to pay any part of the money to the assignees ; and the Court of Session in Scotland order the agent to pay, without prejudice, the balance of monies, after deducting in the meantime the amount due to him, to the assignees, which he does ; and afterwards it appearing clear that he was not entitled to retain any part of the sum which he received from the other agents after notice, he pay to the assignees the difference between the sum paid to the assignees under the order of the Court of Session, and the amount so received from the other agents :—Ordered, that the assignees must refund to the customer the amount paid in by him. Affirmed by L. C. *Ex parte Cunningham*, 1833. 1 Mont. & B. 269. *S. P. Ex parte Solomons*, *id.* 286.

B., a creditor of *A.*, employs *A.* to repair a carriage, undertaking to pay ready money for the repairs ; *B.* cannot, upon offering to set off an adequate portion of the debt, require the re-delivery of the carriage, without payment of the repairs. And if *A.* become bankrupt either before or after the completion of the repairs, his assignees may refuse

to deliver up the carriage, until payment of the amount of the repairs ; it not being, for this purpose, a case of mutual credit. *Clarke v. Fell.* 1 Nevile & Mann. 244. *S. C.* 4 Barn. & Adol. 404.

LIS PENDENS.

On a summary application against the assignees for delivery up of goods seized by them as the property of the bankrupt under the fiat out of the hands of the petitioner, (a stranger to the bankruptcy,) who claimed the goods as his, but who, together with the bankrupt, had been indicted for a conspiracy in secretly and fraudulently removing the goods, which indictment was still pending ; the Court refused to decide on the petition till after the trial, on the ground that it would tend to disclose the assignees' evidence in support of the indictment. *Ex parte Heath.* 2 Dea. & Ch. 140. *S. C.* 1 M. & B. 169.

An appeal pending is not a sufficient ground for staying proceedings, more especially when it is plain that the appeal is brought for the purpose of delay. *Ex parte Hinton.* 2 Dea. & Ch. 407.

An assignee was removed and ordered to account. Pending that order, the new assignees petitioned for the taxation of the bill of the soli-

citors employed by the discharged assignee, and that they might be ordered to account for money charged to have been improperly received by them, with the privity of the former assignee:—Held, that the petition was premature, during the pendency of the former order, but the Court retained it, under the circumstances, until the result of the pending account was known. *Ex parte Carter*, 1833. 2 Dea. & Ch. 626.

LOCUS STANDI IN CUR.

Where former petition of bankrupt was, by the Vice-Chancellor, dismissed on merits, with costs to be paid by the bankrupt, who continues in contempt for non-payment of them, he has no *locus standi* in this Court, being considered in contempt of this Court also; and former decision on same matter held an estoppel. *Ex parte Munk*. 2 Dea. & Ch. 120.

LOSS ON RE-SALE.

See PROFIT AND LOSS.

MACHINERY IN IRON WORKS.

Machinery affixed to the freehold of iron works, is not considered to be within the order and disposition of the bankrupt trader, where by the custom of the country, when iron works are let, such articles are furnished by and continue to be the property of the

lessor. *Rufford v. Bishop*, 1829. 5 Russ. 346.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MARRIAGE SETTLEMENT.

By a marriage settlement, certain lands were conveyed to trustees, to the use of the husband for life, with power of appointment to male issue, remainder to the trustees to preserve contingent remainders; remainder, in default of appointment, to the sons successively in tail general; remainder to the right heirs of the husband. After the marriage the husband became bankrupt, and his lands were conveyed by the Commissioners to his assignees, by deed of bargain and sale, who afterwards sold them, subject to the contingencies in the deed of settlement. The husband afterwards executed a deed of appointment to his son in fee, after the determination of his own life estate:—Held, that the son took no estate under the appointment, but that, under the marriage settlement, he took as estate tail in remainder, expectant on the determination of the life estate of his father. *Badham v. Mee*. 1 Moore & Scott, 14.

Upon a contract by a trader to pay, when required, to the trustees of his marriage settlement, a sum, the interest to himself for life, or

till his bankruptcy, and then to his wife, and having received upon the marriage 150*l.* from the wife, and after payment has been requested by the trustee he becomes bankrupt, without having made any payment, the whole debt is proveable, and the dividend applicable, first, to raise the 150*l.*, the interest of which to be applied to the wife; and, after 150*l.* be raised, the interest on any further sum to be paid to the assignees for the life of the bankrupt, and afterwards according to the trusts of the settlement. *Ex parte Shute*, 1833. 1 Mont. & B. 385.

MASTER'S CERTIFICATE.

See also REFERENCE.

When an order has been made for the taxation of the solicitor's bill of costs, *semble*, that a subsequent petition for the costs of the taxation cannot be heard until the Master has made his certificate, nor unless the original petition is also set down in the paper. *Ex parte Elsee*. 2 Dea. & Ch. 332.

MESNE PROFITS.

See INTERMEDIATE PROFITS.

MEETING OF CREDITORS.

Where the joint and separate creditors, at a meeting duly convened for that purpose, agree to consolidate the two estates, the Court will refer it to the Commissioner to inquire whether such consolidation is for the general

benefit; but will not, upon such a resolution alone, bind the interests of the absent creditors of both classes. *Ex parte Part*. 2 Dea. & Ch. 1.

MEMORANDUM OF DEPOSIT.

Where equitable deposit is made, accompanied with memorandum, for debt, subsequently discharged, and on fresh debt contracted, it is verbally agreed that deposit shall continue as security for latter debt, mortgagee is not entitled to the costs out of produce of sale. *Ex parte Pigeon*. 2 Dea. & Ch. 118.

MERGER.

Where the consignee transfers bills of lading to a creditor, as a security for his debt, and the consignor stops the goods in transitu, the creditor may issue a fiat against the consignee on his original debts. *Ex parte Ashton*, 2 Dea. & Ch. 5.

B. and *C.* being indebted to *A.* give a joint and several bond. *A.* takes (as part of the same security) a joint warrant of attorney, and enters up a joint judgment. *B.* and *C.* become bankrupt:—Held, that the bond is merged in the judgment, and that *A.* can only prove against the joint estate of *B.* and *C.* *Ex parte Christy*. 2 Dea. & Ch. 155. *S. C.* 1 M. & B. 352.

MESSENGER.

The defendant, a messenger attached to certain lists of Commissioners of bankrupt in London, and by them appointed provisional assignee of the estate of a bankrupt, sent an agent or servant to take possession of the bankrupt's estate. The agent received a considerable sum of money, and absconded:—Held, that the defendant was not liable for the amount in an action for money had and received, no negligence, or want of proper caution, being attributable to him. *Raw v. Cutten.* 2 Moore and Scott, 123. S. C. 9 Bing. 96.

MISDESCRIPTION.

See DESCRIPTION OF BANKRUPT.

MISTAKE.

Where a creditor sent up the proper documents to prove his debt at a dividend meeting, and his solicitor forgot the day, another meeting was appointed at his expense, to enable him to prove his debt, the payment of the dividend being ordered to be stayed in the meantime, and to be calculated afresh in case he substantiated his proof. *Re Graham and Tate*, 1833. 2 Dea. & Chit. 554.

MORTGAGE.

See also LEGAL MORTGAGE—EQUITABLE MORTGAGE — MORTGAGOR and MORTGAGEE—SHIP.

An application of the assignees to postpone the sale of mortgaged property refused, where the mortgagee objects to such postponement. *Ex parte Belcher*, 1833. 2 Dea. & Chit. 587.

In an action at the suit of the king against an auctioneer, upon the bond given to make returns of sales by auction, held, upon demurrer to the surrejoinder, that an estate which has been mortgaged by a person who has become bankrupt, and is sold by auction by direction of the assignees, and with the concurrence of trustees appointed to sell the estates to discharge incumbrances, &c., or with the consent of the mortgagees, is, by the stat. 6 Geo. 4. c. 16. s. 98., exempt from the auction duty. *Att. Gen. v. Winstanley*, 1831. 5 Bli. N. S. 130.

On the 10th June, 1830, *W. R.* mortgaged by bill of sale to *W. & Co.* the ships *Lady East*, *Pyramus*, and *Sprightly*, then being at sea. The bill of sale contained an assignment of the freight and policies. On the 12th June, the said bill of sale was entered in the book of registry. On the 18th October the *Sprightly* returned to port, and sailed again on the 16th November. On the 7th January, 1831, *W. R.* mortgaged the same ships, freights, and policies to the petitioners by bill of sale, containing a recital of and subject to the first

mortgage; on the 11th May, 1831, the said second bill was entered in the book of registry; on the 14th June, *W. R.* became bankrupt; on the same day the *Pyramus* arrived from sea; and on the 15th July, the *Lady East* arrived from sea. On the 21st June both mortgages were indorsed on the certificate of the *Pyramus*; and on the 16th July both mortgages were indorsed on the certificate of the *Lady East*. The *Sprightly* was lost at sea:—Held, that the second mortgage was valid as to the interest in the ships, freights, and policies. *Ex parte Jones*, 1832. 2 Crompt. & J. 513.

A tenant in fee of a cotton-mill, in which there was a steam-engine, boilers, &c. mortgaged the mill, engine, boilers, &c. to *B.*, but remained in possession until his bankruptcy. The entablature plate of the engine, which, however, formed no part of the working apparatus, was fixed to the freehold of the mill, every other part of the engine was secured by bolts and screws, and might be removed without injury to the building:—Held, that the steam-engine was not in the order and disposition of *A.* at his bankruptcy. *Hubbard v. Bagshaw*, 1831. 4 Sim. 326.

MORTGAGOR AND MORTGAGEE.

Quære, Whether a third mortgagee

is entitled to his costs of petition to sell, &c., or, whether he ought not to apply to the Commissioner under the general order. *Ex parte Robinson*. 2 Dea. & Chit. 110.

Where a conveyance, by way of mortgage, is made to a trustee for the mortgagee, in trust to sell, and the trustee becomes bankrupt, the mortgagor should join in the application for the appointment of another trustee. *Ex parte Orgill*. 2 Dea. & Chit. 413.

MOTION.

Where notice is given to the respondent of a motion for leave to amend the petition, and such permission is granted after the respondent appears to oppose it, the respondent will not be entitled to the costs of the day. *Ex parte Green*. 2 Dea. & Chit. 42.

Where an order made in bankruptcy reserves further directions and costs, a subsequent application to the Court as to the costs merely, may be entertained by motion; but if it is by way of further directions, it must be by petition. The solicitor for the respondents ought to have notice of such an application, as well as the respondents themselves. *Ex parte Shadbolt*. 2 Dea. & Chit. 286.

If a solicitor refuses to deliver the proceedings to the assignees, the order is of course with costs. *Ex parte Crowe*, 1832. 1 Mont. & B. 90.

MOTIVE OF ISSUING COMMISSION.

A commission issued by one partner against another, not for the purpose of distributing the bankrupt's effects among his creditors, but for the sole purpose of dissolving the partnership, is supersedable. *Ex parte Christie*, 1832. 2 Dea. & Chit. 465. Affirmed on appeal. *Id.* p. 488. S. C. 1 M. & B. 314—329.

MULTIFARIOUSNESS.

Petition by creditors to expunge proofs, to admit proofs, and to remove assignees, not multifarious; but removal of assignees being refused, petition becomes multifarious. *Ex parte Grazebrook*. 2 Dea. & Chit. 186.

MUTUAL CREDIT.

See SET-OFF.

NEW TRIAL.

Where, upon the trial of an issue, to try whether there was a good petitioning creditor's debt, the bankrupt took an objection to the constitution of the debt, which he never alleged in his petition to supersede the commission, and the jury found a verdict against the petitioning creditor, the Court granted a new trial, on the ground of surprise. *Ex parte Christie*. 2 Dea. & Chit. 461.

NOTICE.

See BILLS OF EXCHANGE.

The bankrupt's examination cannot be read as evidence against a third party who had no power of cross-examining him. Notice of reading also necessary. *Ex parte Arnsby*. 2 Dea. & Chit. 212.

Where an order made in bankruptcy reserves further directions and costs, a subsequent application to the Court, as to the costs merely, may be entertained by motion, but if it is by way of further directions, it must be by a petition. The solicitor for the respondents ought to have notice of such an application, as well as the respondents themselves. *Ex parte Shadbolt*. 2 Dea. & Chit. 286.

An equitable mortgagee of two policies of assurance, which the bankrupt had effected on his own life, writes to the insurance office, saying, "I am holder of the undermentioned policies," stating the particulars of the policies in question, and inquiring what sum the office would give, if they were delivered up to be cancelled:—Held, that this was a sufficient notice to the office of a change of ownership. *Ex parte Stright*. 2 Dea. & Chit. 314. See *Ex parte Tennyson*. 1 M. & B. 67.

An equitable mortgagee will not be

preferred to a subsequent legal mortgagee, who had no notice of the equitable mortgage; and the onus lies upon the former, claiming a priority, to prove that the latter had such notice. *Ex parte Hardy*. 2 Dea. & Chit. 393.

The assignment of a policy of insurance without notice to the office, does not prevent the operation of the clause of reputed ownership. *Ex parte Tennyson*, 1832. 1 Mont. & B. 67.

In an action by the assignees of a bankrupt, the defendant gave notice of his intention to dispute the petitioning creditor's debt, the trading, and the act of bankruptcy. At the trial the cause was referred to arbitration, the defendant undertaking to admit before the arbitrator the debt, trading, and act of bankruptcy:—Held, that the judge had no power to certify for the costs occasioned by the notice, under the statute 6 Geo. 4. c. 16. s. 90., the cause not having been actually tried by him. *Barthrop v. Anderton*. 1 Moore & Scott, 361. S. C. 8 Bing. 268.

A commission of bankrupt issued against an infant, upon a debt contracted, and an act of bankruptcy committed, during his minority, is absolutely void; and, if the assignees have reason to know

that he intends to set up his infancy, it is not necessary for him to give them the notice required by the 90th section of the statute 6 Geo. 4. c. 16. that he intends to dispute the proceedings under the commission. *Belton v. Hodges*. 2 Moore & Scott, 496. S. C. 9 Bing. 365.

OFFICERS OF COURT.

Where an attestation was in the following form, "signed by the petitioners *A. B. & C. D.*, in the presence of *T. S.*, acting solicitor for *A. T.* solicitor for the petitioners in this matter," and it appeared that *A. T.* was not a solicitor of this Court; *semble*, nevertheless, that the attestation was good, the petitioners having appeared by counsel. *Ex parte Turner*, 1833. 2 Dea. & Chit. 563. S. C. 1 M. & B. 390.

A summary application being made against three attornies, jointly, to pay over to the assignees a sum of money which they had received as the bankrupt's solicitors under an order of the Court of Chancery:—Held, not sustainable, as they were not all collectively attornies of this Court. *Quære*, whether such an order would have been made, if they had been all attornies of this Court. *Ex parte Hicks*, 1833. 2 Dea. & Chit. 573. S. C. 1 M. & B. 256.

OFFICIAL ASSIGNEE.

Official assignee cannot, under 1 and 2 Will. 4. c. 56. s. 22., take bankrupt's money out of the hands of a solicitor, without discharging his lien. *Ex parte Bowden*. 2 Dea. & Chit. 182.

Although the Court has a controlling power in the appointment of an official assignee, by the Commissioner, yet the Court will not interfere, unless the Commissioner has exercised an unsound discretion in the appointment. *Ex parte Bramaton*. 2 Dea. & Chit. 375.

It is no objection to a petition, that the official assignee has signed it; his signature being merely surplusage. *Ex parte Belcher*, 1833. 2 Dea. & Chit. 587.

Consent of official assignee to supersedeas, upon consent of creditors, not necessary. *Ex parte Parker*, 1833. 1 Mont. & B. 412.

An official assignee must be joined in an action brought by the other assignees. But where his name was omitted in the declaration, the Court allowed it to be amended by inserting his name, on the payment of costs. *Baker v. Neave*, 3 Tyrw. 233. S. C. 1 Comp. & M. 112.

An action lies against the official as-

signee, to recover money received by him under a void commission of bankrupt. *Munk v. Clarke*. 10 Bing. 102.

ORDER AND DISPOSITION.

See REPUTED OWNERSHIP.

ORDER.

And see CONDITIONAL ORDER.

In the ordinary practice of hearing a petition on affidavit, it is irregular for a counsel to examine a witness *vivâ voce*, without any previous order of the Court obtained for that purpose. *Ex parte Baldock*. 2 Dea. & Chit. 60.

Where order of Court is necessary to enable a party to prove, he cannot vote or sign certificate; for instance, trustees, executors, &c. *Ex parte Wyatt*. 2 Dea. & Chit. 211.

An equitable mortgagee is entitled to the growing crops and rents from the date of the *order of sale*. *Ex parte Bignold*. 2 Dea. & Chit. 398.

If the bankrupt refuses to join in the *conveyance* of any part of his estate, the Court will make an order for him to do so, under the 6 Geo. 4. c. 16. s. 78. *Ex parte Jackson*, 2 Dea. & Chit. 458.

An objection to the attestation of a petition is not sustainable after an order has been already made upon it. Where an attestation was in the following form, "Signed by the petitioners, *A. B.* and *C. D.*, in the presence of *T. S.* acting as solicitor for *A. T.*, solicitor for the petitioners in this matter," and it appeared that *A. T.* was not a solicitor of this Court; *Semble*, nevertheless, that the attestation was good, the petitioners having appeared by counsel. *Ex parte Tanner*, 1833. 2 Dea. & Chit. 563. S. C. 1 M. & B. 390.

A petition cannot be reheard to vary a former order merely as to costs; more especially when that order was made a twelvemonth ago, and was drawn up by the very parties who apply to vary it. *Ex parte Burnell*, 1833. 2 Dea. & Chit. 640.

Special and Conditional.

A special order had been obtained for an agent to the petitioner, who was abroad, to sign the petition on her behalf:—Held, that this might be done under the general order of the 12th August, 1809, and the special order was therefore discharged with costs. *Ex parte Moore*, 2 Dea. & Chit. 369.

Semble, that when a petitioner obtains a conditional order of the Court, he is bound to prosecute such

order, under the peril of paying costs to the other party. *Ex parte Austen*, 2 Dea. & Chit. 384.

Order to amend, conditionally, that a party should be served, and the petition be heard in fourteen days. Default having been made in these conditions, the petition was dismissed with costs. *Ex parte Green*, 2 Dea. & Chit. 85.

Upon an application by a prisoner to be discharged from an illegal arrest, the Court cannot impose terms, or order the costs to be paid out of the estate. *Ex parte Helsby*, 1832. 1 Mont. & B. 79.

PARTNERS,

Contract between.

A bankrupt, while in partnership with *K.*, deposits a lease with a creditor, and the partnership is afterwards dissolved, when certain arrangements are made between the bankrupt and the solvent partner:—Held, that no subsequent arrangement of this kind will affect the rights of the creditor under the original deposit, and that he is entitled to the usual order for the sale of the property. *Ex parte Booth*, 2 Dea. & Chit. 59.

A. being a dormant partner with *B.* dissolves partnership, and *B.* is declared indebted to *A.* on balance; *A.* sues *B.* for balance and receives

a cognovit for debt and costs. *B.* becomes bankrupt:—Held, *A.* is entitled to prove his debt against the estate, although some partnership debts are unpaid. *Ex parte Grazebrook.* 2 Dea. & Chit. 186.

One of two partners, on the 4th Jan. commits a secret act of bankruptcy. On the 5th Jan. the other partner accepts three bills in the name of the partnership firm in favour of one of the creditors of the partnership; all of which bills were antedated before the 4th Jan. These bills were afterwards indorsed for a valuable consideration to *R.*, who had no notice of the act of bankruptcy. On the 10th Jan. a joint commission issued against both partners:—Held, that the holder of the bills could not prove them against the joint estate, as the solvent partner could not bind the joint property by accepting bills after the act of bankruptcy of his co-partner. Costs of both parties out of the estate. *Ex parte Ellis,* 1833. 2 Dea. & Chit. 555. S. C. 1 M. & B. 249.

A. and *B.* entered into partnership as brewers, *A.* bringing in, as his share of the capital, a brewhouse and other premises, which were subject to mortgages for debts due by him. *A.* retired from the business, which was continued by *B.* alone, who agreed to take the brewhouse, &c. at a valuation, but the

amount was not to be paid till the mortgages were satisfied. *B.* becomes bankrupt, and the mortgage debts remaining unpaid, his assignees, before any proof made in respect of *A.*'s debt, paid off the mortgages:—Held, that the assignees were entitled to deduct the sums paid by them from the dividends on the sum which was due to *A.* from *B.* at the time of his bankruptcy. *Rowe v. Anderson,* 1831. 4 Sim. 267.

One partner of a banking firm, who was co-trustee with other persons of certain stock, by a forged power of attorney obtained the produce of the stock unknown to his partners, and continued to make false entries in the partnership books, debiting the firm with the amount of the dividends, and continued also to make payments on account of the trust. The firm became bankrupt, and after the bankruptcy and the execution of the partner for the forgery, an account of such supposed receipts and payments was rendered by the assignees to the surviving trustee:—Held, that the balance on such account could not be considered as a debt due from the partnership to the trustees, inasmuch as the transfer of the stock under the forged power of attorney being absolutely void, the property in the stock remained in the trustees, and they were still entitled to receive the dividends at

the Bank of England. *Hume v. Bolland.* 2 Tyrw. 575. S. C. 1 Crompt. & M. 190.

In 1820, *W.* advanced 24,000*l.* to *J. C. S.* and *W. S.* traders, and jointly with them executed a deed, by the express terms of which a partnership stock was created, in which they had all a joint property. *W.* was not to have any definite aliquot proportion of the profits, but was to have an account of the profits as between themselves, and to receive 2,000*l.* or 2,400*l.* a year, as the case might be, out of the profits. *W. S.* never appeared to the world as a partner. The firm became bankrupt in 1826:—Held, that *W.* was a partner in the concern, and that a joint commission against the three, as such joint partners, might be supported; and that the creditors of both the old and new firm were equally entitled to prove against the estate of the latter. *Ex parte Chuck.* 1 Moore & Scott, 615.

One of two partners, after committing an act of bankruptcy, handed over a bank post bill and some silver to the agent of the drawer of a bill of exchange, accepted by the partners, and which was just about to become due, for the purpose of protecting such bill. Such handing over was found to be a fraudulent preference, and to have been in contemplation of

bankruptcy. On the same day, but a few hours later than the time of handing over the note and money, the other partner committed an act of bankruptcy:—Held, that the act of the partner who had committed the act of bankruptcy before he handed over the property was not binding, and that the assignees of the two partners might recover the value of the property. *Burt v. Moul.* 1 Crompt. & M. 525.

PARTNERSHIP, DISSOLUTION OF.

A commission issued by one partner against another, not for the purpose of distributing the bankrupt's effects among his creditors, but for the sole purpose of dissolving the partnership, is supersedable. *Ex parte Christie*, 1832. 2 Dea. & Chit. 465. Confirmed on appeal, *id.* p. 488. S. C. 1 M. & B. 314, 329.

One of two partners, on the 4th Jan. commits a secret act of bankruptcy. On the 5th January, the other partner accepts three bills in the name of the partnership firm, in favour of one of the creditors of the partnership; all of which bills were antedated before the 4th January. These bills were afterwards indorsed for a valuable consideration to *R.*, who had no notice of the act of bankruptcy. On the 10th January, a joint commis-

sion issued against both partners :
—Held, that the holder of the bills could not prove them against the joint estate, as the solvent partner could not bind the joint property by accepting bills after the act of bankruptcy of his co-partner. Costs of both parties out of the estate. *Ex parte Ellis*, 1833. 2 Dea. & Ch. 555. S. C. 1 M. & B. 249.

PARTIES.

See also PETITION, PARTIES TO.

Where a conveyance by way of mortgage is made to a trustee for the mortgagee, in trust to sell, and the trustee becomes bankrupt, the mortgagor should join in the application for the appointment of another trustee. *Ex parte Orgill*. 2 Dea. & Ch. 413.

PARTIES IN PARI DELECTO AND PARTICEPS CRIMINIS.

Where the time for opening a fiat expires by the voluntary act of the petitioning creditor, and it appears that it was issued under suspicious circumstances, namely, for effecting a compromise with the creditors, and not with a *bonâ fide* intention of working it; and a second fiat is issued by another creditor under Lord Loughborough's General Order, the Court will not supersede the second fiat, merely because it was issued by a creditor who was a party to the in-

tended compromise under the first, unless it is clearly for the advantage of the general creditors that the first should stand and the second be superseded. *Ex parte Anjer*. 2 Dea. & Ch. 67.

The act 1 & 2 Will. 4. c. 53. s. 42. does not give validity to commissions of bankrupt founded on concerted acts of bankruptcy; and, therefore, the execution of a deed, whereby a trader assigns all his property to a trustee for the benefit of all his creditors, is not an act of bankruptcy sufficient to support a commission, founded on the petition of a creditor who was either party or privy to such deed. *Marshall v. Barkworth*, 1833. 4 Barn. & Adol. 508.

PAYMENT.

See PROTECTED PAYMENTS.

Where a creditor addresses a written request to assignees, in general terms, to pay "the dividends made on the bankrupt's estate" to *A. B.*, the assignees are justified in paying subsequent dividends to *A. B.* until they have notice from the creditor that he has revoked *A. B.*'s authority. *Ex parte Bright*. 2 Dea. & Chit. 8.

Although the solicitor's bill has been paid, yet it will be ordered to be taxed, on application of the assignees, without any special reason being assigned for the taxa-

tion. *Ex parte Pickering.* 2 Dea. & Chit. 387.

PAYMENT INTO COURT.

Where the bankrupt is ready to pay all his creditors in full, and the only creditor whose consent is wanting to the supersedeas is abroad, the bankrupt may apply to pay the amount of that creditor's debt into Court, in order to prevent any delay in obtaining the supersedeas. *Ex parte Hamilton,* 1832. 2 Dea. & Chit. 519.

A., B. and C. having agreed for the purchase of certain mines, for 10,000*l.*, and to form a joint stock company for working them, and that the mines should be sold to the company for 25,000*l.*, of which 10,000*l.* should be paid to *F.* the proprietor, and the remainder divided amongst themselves and certain of their friends, whom they nominated to be directors and officers of the company; at a meeting of the persons so nominated, at which *A., B. and C.* were present, but before the company was established, it was resolved that the company should purchase the mines for 25,000*l.* to be paid to *F.*; and a conveyance was afterwards taken from *F.* to the trustees of the company, and the 25,000*l.* was paid out of the funds of the company and distributed in the manner agreed upon. A suit having been instituted by some of

the shareholders, on behalf of themselves and the others, against the persons who had participated in the 15,000*l.*, the latter were decreed to refund what they had received, and one of the defendants having become bankrupt after he had paid what he had received into Court, under an order upon motion:—Held, that the plaintiffs were entitled to receive that sum, and were not to be put to prove their demand under the commission. *Hichens v. Congreve,* 1831. 4 Sim. 420.

PETITION.

— *for Allowance.*

One of two assignees admits in the audit paper, previous to a dividend, that a certain sum was reserved by the assignees, applicable to future claims. The bankrupt, on a petition for his allowance after the death of this assignee, is entitled to an inquiry whether any part of that sum ever came to the hands of the surviving assignee. *Ex parte Coombes.* 2 Dea. & Chit. 319.

— *Amendment.*

Amendment of petition. — *Anon.* 2 Dea. & Chit. 22.

Where notice is given to the respondent of a motion for leave to amend the petition, and such permission is granted after the respondent appears to oppose it, the respondent will not be entitled to the

costs of the day. *Ex parte Green.* 2 Dea. & Ch. 42.

Where such an objection is taken to the attestation of a petition for a supersedeas, it may be amended instanter; but not if the petition is to stay a certificate. *Ex parte Tanner*, 1833. 2 Dea. & Chit. 563. S. C. 1 M. & B. 390.

— to Annul.

After a fiat had issued, the bankrupt makes certain proposals to his creditors to prevent the prosecution of it, to which proposals the solicitor for one of the creditors promises to give an answer, at a certain time, on the following day, (the 16th after the date of the fiat,) but before that time arrives he strikes a second docket, for non-prosecution of the first, under the general order:—Held, that this was a breach of faith, and a petition to annul the first fiat was dismissed with costs. *Ex parte Baker.* 2 Dea. & Chit. 362.

Costs will not be given against a bankrupt upon petition to annul a fiat. *Ex parte Heath*, 1832. 1 Mont. & B. 116.

— of Appeal.

Semble, that the period of a month, limited by the statute for presenting the petition of appeal, cannot be extended. *Ex parte Robinson*, 1833. 2 Dea. & Chit. 583.

The Court of Review has no jurisdiction to dispense with the signature of the petitioner to a petition of appeal, under the 1 & 2 Will. 4. c. 56. s. 32.; the Lord Chancellor being the proper authority to apply to for that purpose. *Ex parte Robinson*, 1833. 2 Dea. & Chit. 583.

Attestation and Signature.

A special order had been obtained for an agent to the petitioner, who was abroad, to sign the petition on her behalf:—Held, that this might be done under the general order of the 12th August 1809; and the special order was therefore discharged with costs. *Ex parte Moore.* 2 Dea. & Chit. 369.

An objection to the attestation of a petition is not sustainable, after an order has been already made upon it. Where such an objection is taken to the attestation of a petition for a supersedeas, it may be amended instanter; but not if the petition is to stay a certificate. Where an attestation was in the following form, "Signed by the petitioners, *A. B.* and *C. D.*, in the presence of *T. S.* acting as solicitor for *A. T.*, solicitor for the petitioners in this matter," and it appeared that *A. T.* was not a solicitor of this Court, *semble*, nevertheless, that the attestation was good, the petitioners having

appeared by counsel. *Ex parte Tanner*, 1833. 2 Dea. & Chit. 563. S. C. 1 M. & B. 390.

— for Costs.

Where an order made in bankruptcy reserves further directions and costs, a subsequent application to the Court, as to the costs merely, may be entertained by motion; but if it is by way of further directions, it must be by petition. The solicitor for the respondents ought to have notice of such an application as well as the respondents themselves. *Ex parte Shadbolt*. 2 Dea. & Chit. 286.

When an order has been made for the taxation of the solicitor's bill of costs, *semble*, that a subsequent petition for the costs of the taxation cannot be heard, until the master has made his certificate, nor unless the original petition is also set down in the paper. *Ex parte Elsee*. 2 Dea. & Chit. 332.

Order to amend, conditionally, that a party should be served, and the petition be heard in fourteen days. Default having been made in these conditions, the petition was dismissed with costs. *Ex parte Green*. 2 Dea. & Chit. 85.

— to Expunge.

Petition by creditors to expunge proofs, to admit proofs, and to remove assignees, not multifarious; but removal of assignees

being refused, petition becomes multifarious. *Ex parte Grazebrook*. 2 Dea. & Chit. 186.

Form of.

A petition for leave to prove must state the grounds on which the proof was rejected by the Commissioners. *Ex parte Worth*. 2 Dea. & Chit. 4.

Costs against solicitor for improper petition. *Ex parte Williamson*, 1833. 1 Mont. & B. 266.

Parties to.

Where a conveyance by way of mortgage, is made to a trustee for the mortgagee in trust to sell, and the trustee becomes bankrupt, the mortgagor should join in the application for the appointment of another trustee. *Ex parte Orgill*. 2 Dea. & Chit. 413.

Where the Commissioners have once rejected the proof of a debt, the creditor may petition to prove, notwithstanding the Commissioners referred him to a subsequent meeting, at which he declined to attend. *Ex parte Skipp*. 2 Dea. & Chit. 88. S. C. 1 M. & B. 262.

— Rehearing.

A petition cannot be re-heard to vary a former order merely as to costs; more especially when that order was made a twelvemonth ago,

and was drawn up by the very parties who apply to vary it. *Ex parte Burnell*, 1833. 2 Dea. & Chit. 640.

— *to reverse Adjudication.*

Where the bankrupt, after the choice of assignees, petitions to reverse the adjudication under the 17th section of 1 & 2 W. 4, c. 56., the assignees are not prevented from adducing further evidence to establish the act of bankruptcy, upon which the adjudication of the commission proceeded. *Ex parte Jackson*, 1833. 2 Dea. & Chit. 601. S. C. 1 M. & B. 394.

— *for Sale.*

A petition for the sale of property, in respect of which the creditor holds a legal security, will be dismissed with costs. *Ex parte Moore*. 2 Dea. & Chit. 7.

Service of.

Where the bankrupt is one of two executors, the petition of a party interested under the will must be served on the other executor, as well as on the bankrupt and the assignees. *Ex parte Cutting*. 2 Dea. & Chit. 8.

Where one of three assignees declines to act, the two acting assignees should join in the petition for a new choice; or if one only presents the petition, it should be served upon the other acting assignees. *Ex parte Harris*. 2 Dea. & Chit. 4.

Substituted service of petition on respondent's solicitors. *Ex parte Cox*. 2 Dea. & Chit. 191.

Special order made for the service of a petition to annul a fiat, where the party is not to be met with. *In re Sell*. 2 Dea. & Chit. 333.

If a petitioning creditor is assignee and equitable mortgagee, the petition for a sale must be served on the bankrupt and a creditor. *Re Parker*, 1833. 1 Mont. & B. 394.

Setting down.

Where an order has been made for the taxation of the solicitor's bill of costs, *semble*, that a subsequent petition for the costs of the taxation cannot be heard, until the master has made his certificate, nor unless the original petition is also set down in the paper. *Ex parte Elsee*. 2 Dea. & Chit. 332.

To stay Certificate.

Where an objection is taken to the attestation of a petition for a supersedeas, it may be amended instantly; but not if the petition is to stay a certificate. *Ex parte Tanner*, 1833. 2 Dea. & Chit. 563. S. C. 1 Mont. & B. 390.

On a petition to stay the certificate, after an order has been obtained for its allowance, the Court will not open the order, unless it appears from the petition that the debt of the creditor would turn

the certificate. *Ex parte Skipp.* 2 Dea. & Chit. 88. S. C. 1 Mont. & B. 262.

Where the bankrupt's certificate has been stayed at the instance of creditors, who afterwards withdraw their opposition to it, and appear by counsel to consent to its allowance, the Court will allow the certificate, without the usual explanatory affidavit of the absence of collusion. *In re Hall.* 2 Dea. & Chit. 44.

To supersede.

Where a bankrupt petitions to supersede, and at the same time brings an action against the petitioning creditor to try the validity of the fiat, he must elect which remedy he will pursue. *Ex parte Drake,* 2 Dea. & Chit. 91.

Where a bankrupt petitions to supersede, and bring an action at the same time to dispute the bankruptcy, the Court declined compelling him to elect which proceeding he would continue, but ordered that the petition should stand over until the result of the action was known. *Ex parte Chambers.* 2 Dea. & Chit. 372.

Before the bankrupt petitions to supersede, he must surrender to the fiat, notwithstanding he presents the petition previous to the expiration of the 42 days. *Ex parte Drake.* 2 Dea. & Chit. 91.

Where an objection is taken to the attestation of a petition for a supersedeas, it may be amended instantly; but not if the petition is to stay a certificate. *Ex parte Tanner,* 1833. 2 Dea. & Chit. 563. S. C. 1 Mont. & B. 340.

On a petition by assignees to supersede a commission, the bankrupt's affidavit is admissible to show that the commission was fraudulently concerted. *Ex parte Bellwood.* 2 Dea. & Chit. 37.

A fiat was sued out on the 7th June by an attorney against his debtor, for the amount of his bill of costs, and the bankrupt was shortly afterwards discharged under the insolvent act, having inserted the amount of the attorney's bill in his schedule. The bankrupt passes his last examination; and on the 4th December petitions for an order to tax the attorney's bill with a view of superseding the fiat, on the ground of the insufficiency of the petitioning creditor's debt:—Held, that the bankrupt could not, after lying by so long, and after his previous admission of the debt, apply for such an order. Dissent, Sir J. Cross. *Ex parte Gingell,* 1833. 2 Dea. & Chit. 546.

PETITIONING CREDITOR.

Where a fiat is annulled after adjudication, for an insufficient act of

bankruptcy, it is always at the cost of the petitioning creditor. *Ex parte Fletcher.* 2 Dea. & Chit. 374.

Costs of the application to substitute another debt for the debt of the petitioning creditor, ordered to be paid by the petitioning creditor. *Ex parte Lloyd*, 1832. 2 Dea. & Chit. 506.

The act 1 & 2 Will. 4. c. 53. s. 42. does not give validity to commissions of bankrupt founded on concerted acts of bankruptcy; and therefore the execution of a deed, whereby a trader assigns all his property to a trustee for the benefit of all his creditors, is not an act of bankruptcy sufficient to support a commission, founded on the petition of a creditor, who was either party or privy to such deed. *Marshall v. Barkworth*, 1833. 4 Barn. & Adol. 508.

If a petitioning creditor is assignee and equitable mortgagee, the petition for a sale must be served on the bankrupt and a creditor. *Re Parker*, 1833. 1 Mont. & B. 394.

PETITIONING CREDITOR'S DEBT.

Where the consignee transfers bills of lading to a creditor, as a security for his debt, and the consignor stops the goods in transitu,

the creditor may issue a fiat against the consignee on his original debt. *Ex parte Ashton.* 2 Dea. & Chit. 5.

Petitioning creditor's bill ordered to be taxed by an officer of the Court when objectionable charges have been allowed by the Commissioners. *Ex parte Hattersley.* 2 Dea. & Chit. 373.

If creditor has received and transferred a bill of exchange, the holder of the bill is the proper petitioning creditor. *Ex parte Botten*, 1833. 1 Mont. & B. 412.

A commission of bankrupt issued against an infant, upon a debt contracted, and an act of bankruptcy committed, during his minority, is absolutely void; and, if the assignees have reason to know that he intends to set up his infancy, it is not necessary for him to give them the notice required by the 90th section of the statute 6 Geo. 4. c. 16., that he intends to dispute the proceedings under the commission. *Belton v. Hodges.* 2 Moore & Scott, 496. S. C. 9 Bing. 365.

A., not a trader, was indebted to *B.* to the amount of 100*l.*, and afterwards became a trader. After *A.* had ceased to be a trader (the debt to *B.* still existing,) he committed an act of bankruptcy:—Held, that a commission of bankrupt might be supported upon *B.*'s debt.

Baillie v. Grant. 2 Moore & Scott, 193. S. C. 9 Bing. 193.

Quære, whether an order of the Court of Review in bankruptcy (under the 6 Geo. 4. c. 16. s. 18., and the 1 & 2 Will. 4. c. 56. s. 2.,) for substituting another debt to support a commission in lieu of that of the original petitioning creditor, can be used to the prejudice of a party who has already brought an action, in which he seeks to impeach the validity of the commission, by reason of the insufficiency of the petitioning creditor's debt. *Aireton v. Davies.* 3 Moore & S. 138. S. C. 9 Bing. 740.

The Court will not grant a rule for the taxation of an attorney's bill of costs, at the instance of a third party, who makes the application simply for the collateral purpose of reducing the bill so low as to make him a bad petitioning creditor. *Clutterbuck v. Nicholls.* 2 Neville & Mann. 209.

PLEA OF BANKRUPTCY.

By 6 Geo. 4. c. 16. s. 126., a certificated bankrupt may plead his bankruptcy to any action for a debt, which was proveable under the commission. *Robertson v. Score,* 1832. 3 Barn. & Adol. 338.

It is a good answer to a plea of bankruptcy, that the certificate was

obtained by fraud, though the enactment to that effect in 5 Geo. 2. c. 30. s. 7. is not repeated in 6 Geo. 4. c. 16. *Horn v. Ion,* 1832. 4 Barn. & Adol. 78.

POLICY OF INSURANCE.

An equitable mortgagee of two policies of assurance, which the bankrupt had effected on his own life, writes to the insurance office, saying, "I am holder of the under-mentioned policies," stating the particulars of the policies in question, and inquiring what sum the office would give if they were delivered up to be cancelled:—Held, that this was a sufficient notice to the office of a change of ownership. *Ex parte Stright.* 2 Dea. & Chit. 314. See *Ex parte Tennyson.* 1 M. & B. 87.

The assignment of a policy of insurance without notice to the office, does not prevent the operation of the clause of reputed ownership. *Ex parte Tennyson.* 1 Mont. & B. 67.

POWER OF ATTORNEY.

Where all creditors consent to a supersedeas, except *A.*, who is abroad, and *B.* holds a power of attorney from *A.*, authorizing him to consent:—Held, that *B.* was entitled to consent; and an attested copy of the power was ordered to be filed with the pro-

ceedings. *Ex parte Hamilton*. 2 Dea. & Ch. 139.

A power of attorney from a creditor residing abroad to sign the bankrupt's certificate, is sufficiently authenticated by the attestation of a notary public, without any affidavit to verify the signature. *Ex parte Myers*. 2 Dea. & Chit. 406.

A power of attorney to sign a bankrupt's certificate, executed by a creditor resident abroad, is sufficiently authenticated, if attested by the British consul. *Ex parte Wilkinson*, 1833. 2 Dea. & Chit. 585. S.C. 1 M. & B. 257.

The signature, by power of attorney, to a certificate, admitted, although the power was not strictly formal. *Ex parte Wilkinson*, 1833. 1 Mont. & B. 257.

PRACTICE IN COURT.

See also PETITION.

Upon an appeal in bankruptcy the appellant is entitled to begin. *Ex parte Belcher*, 1833. 1 Mont. & B. 286.

PRINCIPAL AND AGENT.

Where a creditor addresses a written request to assignees, in general terms, to pay "the dividends made on the bankrupt's estate" to *A. B.*, the assignees are justified in paying subsequent dividends to *A. B.* until they have notice from the

creditor that he has revoked *A. B.*'s authority. *Ex parte Bright*. 2 Dea. & Ch. 8.

A., who resided at Liverpool, was in the habit of making consignments of goods to *B.*, his agent in South America, for sale, on the faith of and against which consignments *A.* drew bills proportioned to their amount to be paid by the agent out of the proceeds, and the bills were negotiated by the indorsements of *C.*, *A.*'s correspondent in London. Some of the bills so indorsed were refused acceptance by the agent. *C.*, on receiving information that they had been so dishonoured, requested that *A.* would order his agent, in case he did not pay his, *A.*'s drafts immediately, to hand over to *C.*'s agent such property as he had of *A.*'s of an equivalent value to the bills that should not be paid by him. *A.* agreed to do so, but became bankrupt before his order to transfer the goods reached South America:—Held, that the bargain between *A.* and *C.* did not operate as a legal or equitable assignment of the property in *A.*'s goods held by *B.*, his agent, but that they remained the property of *A.* at the time of his bankruptcy, and passed to his assignees. *Carvalho v. Burn*, 1833. 4 Barn. & Adol. 382.

If a London banker, having a branch bank at Edinburgh, stops payment

in London, and after the stoppage, but before notice, a customer pays to the agent at Edinburgh, bank notes and cash, to be remitted to London, and at that time the banker is indebted to the agent, and the agent after the notice, in pursuance of a special direction from the banker, receive money from other agents, for the purpose of forwarding to London, and a fiat issue against the banker, at which period the monies in the hands of the agent are more than sufficient to cover the amount due to him from the banker, but the amount which he had at the time of notice of the stoppage, including the bank notes, was insufficient, and the customer requires the agent to return the bank notes, which he does not comply with, and the agent refuse to pay any part of the money to the assignees, and the Court of Session in Scotland order the agent to pay, without prejudice, the balance of monies, after deducting in the meantime the amount due to him, to the assignees, which he does; and afterwards it appearing clear that he was not entitled to retain any part of the sum which he received from the other agents after notice, he pays to the assignees the difference between the sum paid to the assignees under the order of the Court of Session and the amount so received from the other agents: Ordered, that the assignees must

refund to the customer the amount paid in by him. Affirmed by L. C. *Ex parte Cunningham*, 1838. 1 Mont. & B. 269.

PRIORITY OF TITLE.

An equitable mortgagee will not be preferred to a subsequent legal mortgagee, who had no notice of the equitable mortgage, and the onus lies upon the former, claiming a priority, to prove that the latter had such notice. *Ex parte Hardy*. 2 Dea. & Chit. 393.

PRIVATE CONTRACT.

The Court will make no order on a petition of the assignees to sell any portion of the bankrupt's property by private contract, it being a matter in which they must use their own discretion. *Ex parte Hurley*, 1839. 2 Dea. & Chit. 631.

PRIVILEGE FROM ARREST.

A witness from Gravesend having attended this Court pursuant to a summons, being arrested for debt in Pancras Lane, city, while waiting for the conveyance home, was discharged; although he had, on leaving this Court, gone to Catherine Street, Strand. But without costs as against the officer, he not having been shown the summons to attend this Court. *Ex parte Clarke*, 2 Dea. & Chit. 99.

By 6 G. 4. c. 16. s. 127., if a bankrupt has been bankrupt before,

and does not pay 15s. in the pound under the second commission, his person only is protected by the certificate, and his future effects vest in the assignees. *Robertson v. Score*, 1832. 3 Barn. & Adol. 338.

PRIVITY OF CONTRACT, &c.

An assignee was removed and ordered to account. Pending that order, the new assignee petitioned for the taxation of the bill of the solicitors employed by the discharged assignee, and that they might be ordered to account for money charged to have been improperly received by them with the privity of the former assignee:—Held, that the petition was premature, during the pendency of the former order, but the Court retained it under the circumstances, until the result of the pending account was known. *Ex parte Carter*, 1833. 2 Dea. & Chit. 626.

Where the assignee of a bankrupt is removed, and a new one appointed: *Quære*, whether a party having money in his hands, which he received on account of the bankrupt's estate, in the character of agent to the late assignee, be liable in assumpsit for money had and received to the use of the newly appointed one? But the former assignee having been insane when the money was received:—Held, that such receiver was liable at all events; for he could not be

the agent of an insane person, and therefore held the property as a mere stranger. *Stead v. Thornton*, 1832. 3 Barn. & Adol. 357.

PRODUCTION OF PAPERS.

Where documents are referred to in an affidavit, it does not give the other side an absolute right to their production, but it is a matter for the discretion of the Court. Motion for this purpose, before hearing petition, refused with costs. *Ex parte Arnaby*. 2 Dea. & Chit. 192.

PROFIT AND LOSS.

The petitioner, an equitable mortgagee of leasehold property, obtained an order for a sale, at which 950*l.* was bid for the mortgaged premises, but they were bought in by direction of the assignees. The petitioner afterwards applied to the Commissioners for another sale, but the order they made being unsatisfactory to him as to the time of sale, he refused to accept it; and the assignees afterwards obtained another order, when the highest bidding was only 650*l.*:—Held, that the petitioner, by applying for a second sale, waived any claim against the assignees for the difference in the amount of the biddings at the first and second sale, but that he was entitled to be indemnified from the ground-rent and all expenses in-

curred since the first sale. *Ex parte Baldock.* 2 Dea. & Chit. 60.

PROOF.

See also DOUBLE PROOF.

A petition for leave to prove must state the grounds on which the proof was rejected by the Commissioners. *Ex parte Worth.* 2 Dea. & Ch. 4.

It is no objection to the proof of a debt under a third commission, that the creditor might have proved it under the second commission, under which the bankrupt has obtained his certificate, if the bankrupt has not paid 15s. in the pound under the second commission. *Ex parte Morley.* 2 Dea. & Chit. 45.

Where trustees under marriage settlement lend wife's money to husband with her consent, and husband becomes bankrupt, they cannot, on behalf of wife, prove for interest of money, but only for the principal; she having been supported by her husband since marriage, upon the principles applicable to wife's pin-money. *Scoble, secus* if they prove to save themselves from consequences of their own act, her consent not having been given. *Ex parte Green.* 2 Dea. & Ch. 113.

A. covenants to pay annuity on de-

fault of *B.*, *A.* becomes bankrupt before any default. The annuitant cannot prove against *A.*'s estate, he not having contracted a debt, until the default made either under the 54th or 56th clauses of 6 Geo. 4. *Ex parte Thompson.* 2 Dea. & Chit. 126. S. C. 1 M. & B. 219.

B. and *C.* being indebted to *A.* give a joint and several bond; *A.* takes (as part of the same security) a joint warrant of attorney, and enters up a joint judgment. *B.* and *C.* become bankrupt:—Held, that the bond is merged in the judgment, and that *A.* can only prove against the joint estate of *B.* and *C.* *Ex parte Christy.* 2 Dea. & Chit. 155. S. C. 1 M. & B. 352.

A., being a dormant partner with *B.*, dissolves partnership, and *B.* is declared indebted to *A.* on balance; *A.* sues *B.* for balance, and receives cognovit for debt and costs, *B.* becomes bankrupt:—Held, *A.* is entitled to prove his debt against the estate, although some partnership debts are unpaid. *Ex parte Grazebrook.* 2 Dea. & Chit. 186.

Where an order of Court is necessary to enable a party to prove, he cannot vote or sign certificate; for instance, trustees, executors, &c. *Ex parte Wyatt.* 2 Dea. & Chit. 211.

In consideration of *A.* allowing *B.* to draw upon him, and accept his drafts, *C.* guarantees to him the payment of the amount of all such acceptances. *C.* becomes bankrupt, when the acceptances are not yet due :—Held, that after the acceptances have become due, and *B.* has neglected to provide for them, *A.* is entitled to prove the amount against *C.*'s estate, under the 6 Geo. 4. c. 16. s. 56. *Ex parte Myers.* 2 Dea. & Chit. 251. 8. C. 1 M. & B. 229.

A. discounts for *K. & Co.*, who afterwards become bankrupt, three bills drawn by *K. & Co.* on *D.* and *S.*; one of the bills becomes due before the bankruptcy, and the two others afterwards; none of them are paid by the acceptors, and *A.* gives no notice to *K. & Co.* of their dishonour :—Held, that *A.* could not prove the first bill, but might prove the two others. *K. & Co.* also sent to *A.* five other bills drawn by them on *D. & S.*, and received from him, in return, his acceptances for the precise amount, which they discounted with their own bankers; but none of which being paid by *A.* (who became bankrupt himself before they fell due) they were proved by the holders under *K. & Co.*'s commission. *A.* having never negotiated the five bills sent him by *K. & Co.* :—Held, that his assignees could not prove them

under *K. & Co.*'s commission. *Ex parte Solarte.* 2 Dea. & Chit. 261.

C. & Co., before their bankruptcy, guarantee to *A.* the payment of 300*l.* for the erection by him of a sugar-mill for *D.*, on the production of a certificate by an engineer that the mill was erected according to the terms of a certain specification. *A.* produces a certificate of the erection of the mill, stating, however, a deviation from the original plan, with the consent of *D.*; upon which *C. & Co.*, without making any objection to such deviation, informed *A.* it was not in their power to pay the money :—Held, that *A.* might prove the 300*l.* under the fiat issued against *C. & Co.* *Ex parte Ashwell.* 2 Dea. & Chit. 281.

The two trustees under the marriage settlement of *H.*, a bankrupt, advance him, on the security of his bond, the amount of the trust fund, (which was his wife's fortune,) for the purpose of being employed in his business; and one of the trustees afterwards enters into a parol agreement with *H.* and his partner, that the loan should be considered a debt due from the partnership :—Held, that this subsequent agreement, was in the nature of a collateral security, and that the trustees could prove both against the joint estate, and the separate estate of *H.*, making their election afterwards

from which estate they would receive dividends. *Ex parte Kedie*, 2 Dea. & Chit. 321.

A testator indebted on bond devises his real estate to the bankrupt and two other trustees, for payment of his debts. The bond creditor, after the testator's death, brings an action against the bankrupt and the other devisees, and recovers a joint judgment against them:—Held, that he could not prove under the separate commission against the bankrupt, even for the purpose of voting in the choice of assignees. *Ex parte Pearse*. 2 Dea. & Chit. 451.

By a deed of composition entered into by the bankrupt with his creditors, dated 5 September 1831, he agreed to pay them 10s. in the pound by two instalments of 5s. each; in consideration of which the creditors covenanted to release him from his debts, as soon as both instalments were paid. This deed was executed only by the major part of the creditors. After the payment of the first instalment, on the 31st October 1831, a commission issued on an act of bankruptcy committed in June 1831:—Held, that the creditors who had received the first instalment were entitled to prove for the residue of their debts, without refunding the amount of the instalment. *Ex parte Wood*, 1832. 2 Dea. & Chit. 508.

Where a creditor, after the issuing of the fiat, assigns his debt, this does not give the assignee a right to prove it, but merely a right to call upon the assignor to prove the debt, as a trustee for the assignee. *Ex parte Dickenson*, 1832. 2 Dea. & Chit. 520.

One of two partners, on the 4th January, commits a secret act of bankruptcy. On the 5th January, the other partner accepts three bills in the name of the partnership firm, in favour of one of the creditors of the partnership; all of which bills were ante-dated before the 4th January. These bills were afterwards indorsed for a valuable consideration to R., who had no notice of the act of bankruptcy. On the 10th January, a joint commission issued against both partners:—Held, that the holder of the bills could not prove them against the joint estate; as the solvent partner could not bind the joint property by accepting bills after the act of bankruptcy of his co-partners. Costs of both parties out of the estate. *Ex parte Ellis*, 1833. 2 Dea. & Chit. 555. S. C. 1 M. & B. 249.

Bankrupt executor ordered to prove against his own estate, and the assignees to pay the dividends into the hands of the accountant-general to the credit of a cause pending for the administration of

assets. *Ex parte Colman*, 1833. 2 Dea. & Chit. 584.

A sheriff having seized a defendant's goods, against whom a commission of bankrupt had subsequently issued, the goods were claimed by *A. B.* and *C. D.*, the assignees; upon which the sheriff delivers up the goods to them, taking from them a joint bond of indemnity against all loss, charges, &c., which he might sustain by quitting possession and returning *nulla bona*. An action is brought against the sheriff by the execution creditor for a false return, and a verdict returned against him for 800*l.* *A. B.*, one of the co-obligors in the bond, afterwards becomes bankrupt, but before the sheriff had paid the amount of the verdict:—Held, that the sheriff could not as yet prove under this bond, having sustained no actual pecuniary loss; but as the damage was inchoate, he was entitled to have a claim entered, with a reservation of dividends. *Ex parte Marshall*, 1833. 2 Dea. & Chit. 589. S. C. 1 M. & B. 242. See *Young v. Marshall*. 1 Moore & S. 140. S. C. 8 Bing. 43.

An accommodation indorser is a person liable to pay the bill for the party accommodated; against whom, therefore, if he become bankrupt, such indorser, though not called on to pay the bill till after the bankruptcy, may prove

the amount under section 52 of 6 G. 4. c. 16. *Bassett v. Dodgin*, 9 Bing. 653. S. C. 2 Moore & S. 777.

A., *B.* and *C.* having agreed for the purchase of certain mines for 10,000*l.*, and to form a joint stock company for working them, and that the mines should be sold to the company for 25,000*l.*, of which 10,000*l.* should be paid to *F.* the proprietor, and the remainder divided amongst themselves and certain of their friends, whom they nominated to be directors and officers of the company; at a meeting of the persons so nominated, at which *A.*, *B.* and *C.* were present, but before the company was established, it was resolved that the company should purchase the mines for 25,000*l.* to be paid to *F.*; and a conveyance was afterwards taken from *F.* to the trustees of the company, and the 25,000*l.* was paid out of the funds of the company and distributed in the manner agreed upon. A suit having been instituted by some of the shareholders, on behalf of themselves and the others, against the persons who had participated in the 15,000*l.*, the latter were decreed to refund what they had received, and one of the defendants having become bankrupt after he had paid what he had received into Court, under an order upon motion:—Held, that the plaintiffs were entitled to receive that sum,

and were not to be put to prove their demand under the commission. *Hichens v. Congreve*, 1831. 4 Sim. 420.

An annuity granted by *A.* to *B.* was secured by a covenant by *C.*, a surety, to pay the annuity in case *A.* made default, and by a judgment for 2,100*l.* entered up against *A.* and *C.* The annuity remained unpaid from January 1823, *A.* having left the country; and in February 1824, *C.* became bankrupt, and afterwards obtained his certificate. *C.* having died, *B.* filed a bill to have the arrears of the annuity paid out of his real and personal estates:—Held, that neither the value of the annuity, nor the sum due on the judgment, was proveable under *C.*'s commission, and therefore, that his certificate was not a bar to the plaintiff's demand. *Johnson v. Compton*, 1830. 4 Sim. 37.

Upon a contract by a trader to pay, when required, to the trustees of his marriage settlement, a sum, the interest to himself for life, or till his bankruptcy, and then to his wife, and having received upon the marriage 150*l.* from the wife, and after payment has been requested by the trustee he becomes bankrupt, without having made any payment, the whole debt is proveable, and the dividend applicable, 1*st*, to raise the 150*l.*, the interest

of which to be applied to the wife; and, after 150*l.* be raised, the interest on any further sum to be paid to the assignees for the life of the bankrupt, and afterwards according to the trusts of the settlement. *Ex parte Skute*, 1833. 1 Mont. & B. 385.

PROTECTED PAYMENTS.

After the bankruptcy of one of two partners, the solvent partner, thinking the firm capable of paying its debts, continued the business and paid partnership money into a banker's to be applied in discharge of running bills of the firm, payable at the bank; and it was so applied:—Held, that this payment having been made *bona fide*, and without any contemplation of bankruptcy by the solvent partner, was valid at law. The assignees and the solvent partner afterwards opened a fresh account at the bank, and paid in 900*l.*, to discharge a debt on the old account, which carried interest. The second partner then became bankrupt:—Held, that the assignees of the two could not recover this last sum. *Woodbridge v. Swann*, 1833. 4 Barn. & Adol. 633.

PROVISIONAL ASSIGNEE.

The defendant, a messenger attached to certain lists of Commissioners of bankrupt in London, and by them appointed provisional assignee of the estate of a bankrupt,

sent an agent or servant to take possession of the bankrupt's effects. The agent received a considerable sum of money and absconded:—Held, that the defendant was not liable for the amount in an action for money had and received, no negligence, or want of proper caution, being attributable to him. *Raw v. Cutten*, 2 Moore & Sc. 123. S. C. 9 Bingh. 96.

PURCHASER.

Upon supersedeas by consent, a purchaser is entitled to be indemnified against judgments outstanding before the bankruptcy. *Ex parte Lautour*, 1832. 1 Mont. & B. 89.

PURCHASE,

By persons in Fiduciary Situations.

A., an assignee, purchases, as trustee for *B.*, some shares which the bankrupt had in certain mines, and, after retaining them in that character a twelvemonth, re-purchases them of *B.*, for his own use:—Held, that the transaction was void, on the general principle that an assignee cannot purchase any part of the bankrupt's property, either for himself or another; and that *A.* must be considered a trustee of the shares for the benefit of the general creditors. *Ex parte Grylls*. 2 Dea. & Chit. 290.

REFERENCE.

See also SCANDAL.

Where the joint and separate creditors, at a meeting duly convened for that purpose, agree to consolidate the two estates, the Court will refer it to the Commissioner to inquire whether such consolidation is for the general benefit; but will not, upon such a resolution alone, bind the interests of the absent creditors of both classes. *Ex parte Part*. 2 Dea. & Chit. 1.

Affidavits not referred for impertinence till hearing of petition. *Ex parte Arnsby*. 2 Dea. & Chit. 119.

Petitioning creditor's bill ordered to be taxed by an officer of the Court, when objectionable charges have been allowed by the Commissioners. *Ex parte Hattersley*. 2 Dea. & Chit. 373.

Where a trustee becomes bankrupt, a new one may be appointed, on petition, without any reference to the master; although the bankrupt had no portion of the trust property in his hands. *Ex parte Buffery*, 1833. 2 Dea. & Chit. 576.

Although a Commissioner has no power, under the 106th section of 6 Geo. 4. c. 16., to charge the assignees with monies, which but for their wilful default they might have received, yet where he charged

them with certain sums as received "by themselves, or their solicitors," the Court referred it back to him to ascertain the amount which the assignees, or any person for them, had received, or which but for their wilful default might have been received. *Ex parte Keys* and *Ex parte Weston*, 1833. 2 Dea. & Chit. 633.

The 12th New Orders, 3d April 1828, applied to affidavits in bankruptcy, which had been referred for scandal and impertinence. *Ex parte Chester*, 1830. 4 Sim. 12.

REFUNDING.

By a deed of composition entered into by the bankrupt with his creditors, dated 5th September 1831, he agreed to pay them 10s. in the pound by two instalments of 5s. each, in consideration of which the creditors covenanted to release him from his debts, as soon as both instalments were paid. This deed was executed only by the major part of the creditors. After the payment of the first instalment, on the 31st October 1831, a commission issued on an act of bankruptcy committed in June 1831:—Held, that the creditors who had received the first instalment were entitled to prove for the residue of their debts without refunding the amount of the instalment. *Ex parte Wood*, 1832. 2 Dea. & Chit. 508.

REHEARING.

The rule that no petition for rehearing is allowed for costs only does not apply (*come semble*) to a petition for a re-hearing on the ground of an erroneous decision on the merits, although the material effect of such decision may be to render the party liable for costs. *Ex parte White*. 2 Dea. & Chit. 334.

Although six months is the time limited by the practice of the Court for presenting a petition for re-hearing, *semble*, that under special circumstances the rule may be dispensed with. 2 Dea. & Chit. 334.

But, *note*. The report of the judgment of *Erskine*, C. J. in p. 356, as far as relates to the existence of this rule, is incorrect; for in the subsequent case of *Ex parte Greenwood, re Baillie*, 6th November 1833, *post*, vol. 3, *Erskine*, C. J. said that in *Ex parte White* he declared he was not aware of such a rule, and his judgment must therefore be taken as thus far qualified, and his Honor merely put it hypothetically that if such a rule existed, yet the circumstances of the case of *Ex parte White* took it out of such rule. And in *Ex parte Greenwood*, the counsel, (though time was given to them) on a subsequent day declined to argue in support of such a rule.

RELATION TO ACT OF BANKRUPTCY.

One of two partners, after committing an act of bankruptcy, handed over a bank post bill and some silver to the agent of the drawer of a bill of exchange accepted by the partners, and which was just about to become due, for the purpose of protecting such bill. Such handing over was found to be a fraudulent preference, and to have been in contemplation of bankruptcy. On the same day, but a few hours later than the time of handing over the note and money, the other partner committed an act of bankruptcy:—Held, that the act of the partner who had committed the act of bankruptcy before he handed over the property was not binding, and that the assignees of the two partners might recover the value of the property. *Burt v. Moul.* 1 Crompt. & M. 525. See also *Hutton v. Balme.* 2 Tyrw. 620. *Post, tit. SHERIFF.*

RENEWED FIAT.

Upon issuing a renewed country commission it is the duty of the assignees or their agent (the solicitor) to ascertain whether the Commissioners are able and willing to act; otherwise, they are liable to the costs of a new fiat, if it be necessary, from inability or unwillingness to act on the part of the Commissioners who are named in

the renewed fiat. *Re Williams.* 2 Dea. & Ch. 112.

RENT.

And see DISTRESS—LEASE.

A landlord, who has distrained the goods of a tenant, who being arrested after the distress goes to gaol, and petitions the Insolvent Debtors' Court, before the goods are sold, is entitled to the whole of the rent due, and is not restricted to one year's rent. *Wray v. Earl of Egremont.* 1 Nevile & M. 188.

REPUTED OWNERSHIP, AND ORDER AND DISPOSITION.

W., a horse contractor, lets out a cart-horse on hire to *N. & Co.*, who have it in their possession more than a twelve-month, and then become bankrupt:—Held, that it does not pass to their assignees, as being in their reputed ownership. On a petition by the owner for the re-delivery of the horse, and a *vitâ voce* examination of witnesses, the bankrupt is an incompetent witness. *Ex parte Wiggins.* 2 Dea. & Ch. 269. S. C. 1 Mont. & B. 168.

An equitable mortgagee of two policies of assurance, which the bankrupt had effected on his own life, writes to the insurance office, saying, "I am holder of the under-mentioned policies," stating the particulars of the policies in question, and inquiring what sum the

office would give, if they were delivered up to be cancelled:—Held, that this was a sufficient notice to the office of a change of ownership. *Ex parte Stright*. 2 Dea. & Ch. 314. See *Ex parte Tennyson*, 1 M. & B. 67.

A ship-owner assigned to B. the freight earned and to be earned by one of his ships, and afterwards chartered her to C. for a voyage to S. The outward freight was paid to A. before the ship sailed. The charter-party afterwards was delivered to B., by A.'s direction, and B. gave notice of the assignment to C. Afterwards, but before the ship returned, A. became bankrupt:—Held, that the homeward freight was not in A.'s order and disposition at his bankruptcy; and, therefore, that B. was entitled to it. *Douglas v. Russell*, 1831. 4 Sim. 524.

J. S. became possessed (in trust, as executor of his deceased father,) of certain shares in the joint stock of the Lead Smelting Company. The only evidence of a party's interest in the stock of this company is a book, in which are entered all transfers of shares. In this book there was an entry signed by J. S. purporting to be a transfer of the shares in question, from himself as executor, to himself in his individual character. Where the transfer is made in pursuance of a *bonâ fide* sale for a money con-

sideration, the words, "sell and assign" were used; but in this instance those words were erased. On the faith of his apparent ownership of these shares, J. S. acted as a director of the company, and received the dividends to his own use up to the time of his bankruptcy; and, on passing his accounts under the commission, he treated the shares as his own property. Upon an issue directed to try the right to these shares, between J. S. and another, as executors of the original proprietor, and the assignees of J. S., it was left to the jury to say, whether or not the shares were, at the time of the bankruptcy, in the possession, order, or disposition of the bankrupt, with the consent and permission of the true owner. The jury having found for the plaintiffs, the Court refused to disturb the verdict. *Cooper v. De Tastet*. 2 Moore & Scott, 714.

Where a debt is assigned, unless notice be given to the debtor, the assignor must be considered as continuing (within the purview of the bankrupt acts) to have the order and disposition of the debt, until notice to the debtor of the assignment.

So, where one of two joint creditors releases his interest to his companion. *Dean v. James*. 1 Nevile & Mann. 392.

The furniture of a coal mine is property, of which the party who works the mine is the reputed owner, and which upon his bankruptcy will vest in the assignees, under 6 Geo. 4. c. 16. s. 72. *Coombs v. Beaumont*. 2 Nevile & Mann. 235.

The assignment of a policy of insurance without notice to the office, does not prevent the operation of the clause of reputed ownership. *Ex parte Tennyson*, 1832. 1 Mont. & B. 67.

L. took a lease of a mill and iron forge, and bought the fixed and moveable implements &c., but it was agreed that they should be delivered up at the end or other determination of the term, at a valuation, if the lessors should give fifteen months' notice of their desire to have them. *L.* afterwards conveyed all his interest in the premises, implements &c., to a creditor in trust, if default should be made by *L.* in paying certain instalments, to enter upon and sell the same, and satisfy himself out of the proceeds, re-assigning the residue; and if the lessor should require a re-sale of the implements &c. the proceeds of such re-sale were to go in discharge of the debt, if unsatisfied. *L.* made default and subsequently became bankrupt, after which, and during the term, the creditor

who had not before interfered entered upon the property:—Held, on trespass brought by the assignees, that *L.* had at the time of his bankruptcy the reputed ownership of the moveable goods, but not of the fixtures. *Clark v. Crownshaw*, 1832. 3 Barn. & Adol. 804.

A tenant in fee of a cotton mill, in which there was a steam-engine, boilers, &c. mortgaged the mill, engine, boilers, &c. to *B.*, but remained in possession until his bankruptcy. The entablature plate of the engine, which, however, formed no part of the working apparatus, was fixed to the freehold of the mill, every other part of the engine was secured by bolts and screws, and might be removed without injury to the building:—Held, that the steam-engine was not in the order and disposition of *A.* at his bankruptcy. *Hubbard v. Bagshaw*, 1831. 4 Sim. 326.

Machinery affixed to the freehold of iron-works, is not considered to be within the order and disposition of the bankrupt trader, where, by the custom of the country, when iron-works are let, such articles are furnished by and continue to be the property of the lessor. *Ruford v. Bishop*, 1829. 5 Russ. 346.

A lease was granted to *W.*, who afterwards committed an act of

bankruptcy, and then executed a deed, stating that his name had been used in the lease in trust for *R.*, and declaring the trust accordingly: a bill was filed on behalf of the creditors of *W.* under the commission, claiming the lease as part of his estate; and the Court directed an issue to try whether *W.*'s name was used in the lease as a trustee for *R.*:—Held, that the issue was properly directed. The jury having found a verdict in the affirmative:—Held, also, that the declaration of trust was valid, though executed after bankruptcy, and that the lease did not pass to *W.*'s assignees. *Gardner v. Rowe*, 1828. 5 Russ. 258.

RESTITUTION OF PROPERTY.

On a summary application against the assignees for delivery up of goods, seized by them as the property of the bankrupt under the fiat, out of the hands of the petitioner (a stranger to the bankruptcy) who claimed the goods as his, but who, together with the bankrupt, had been indicted for a conspiracy in secretly and fraudulently removing the goods, which indictment was still pending:—The Court refused to decide on the petition till after the trial, on the ground that it would tend to disclose the assignees' evidence in support of the indictment. *Ex parte Heath*. 2 Dea. & Ch. 140. S. C. 1 M. & B. 169.

The Court will not interfere, by ordering the messenger to withdraw from the possession of goods which he has seized under the bankruptcy in any case of reputed ownership. *Ex parte Harling*. 2 Dea. & Ch. 389.

A summary application being made against three attornies, jointly, to pay over to the assignees a sum of money which they had received as the bankrupt's solicitors under an order of the Court of Chancery,—Held, not sustainable, as they were not all collectively attornies of this Court. *Quære*, whether such an order would have been made, if they had been all attornies of this Court. *Ex parte Hicks*, 1833. 2 Dea. & Ch. 573. S. C. 1 Mont. & B. 256.

REVOCATION OF AUTHORITY.

Where a creditor addresses a written request to assignees, in general terms, to pay "the dividends made on the bankrupt's estate" to *A. B.*, the assignees are justified in paying subsequent dividends to *A. B.* until they have notice from the creditor that he has revoked *A. B.*'s authority. *Ex parte Bright*. 2 Dea. & Chit. 8.

SALARY OF SERVANTS, &c.

If a clerk and foreman is engaged at a weekly salary, and to have two

suits of clothes per annum, it is a yearly hiring within section 48 of 6 Geo. 4. c. 16. The words "six months," in sect. 48, mean "six lunar months." *Ex parte Humphreys*, 1833. 1 Mont. & B. 413.

The provision as to servants is not confined to trade clerks. *Ex parte Gough*, 1833. 1 Mont. & B. 417.

The proviso as to servants extends only to yearly servants. *Ex parte Skinner*, 1833. 1 Mont. & B. 417.

SALE.

See also CONDUCT OF SALE.

A petition for the sale of property, in respect of which the creditor holds a legal security, will be dismissed with costs. *Ex parte Moore*, 2 Dea. & Ch. 7.

This Court has jurisdiction to order sale of estate legally mortgaged, on application of mortgagee, giving him leave to bid. *Ex parte Bacon*. 2 Dea. & Chit. 181.

Although an equitable mortgagee may waive his privilege to bid, the assignees must still have the conduct of the sale. *Ex parte Smith*. 2 Dea. & Chit. 60.

The petitioner, an equitable mortgagee of leasehold property, obtained an order for a sale, at which

950*l.* was bid for the mortgaged premises, but they were bought in by direction of the assignees. The petitioner afterwards applied to the Commissioners for another sale, but the order they made being unsatisfactory to him, as to the time of sale, he refused to accept it; and the assignees afterwards obtained another order, when the highest bidding was only 650*l.*:—Held, that the petitioner, by applying for a second sale, waived any claim against the assignees for the difference in the amount of the biddings, at the first and second sale; but that he was entitled to be indemnified from the ground-rent, and all expenses incurred since the first sale. *Ex parte Baldock*. 2 Dea. & Chit. 60.

Where an equitable mortgagee is also an assignee, a solicitor will be appointed to take the account, and conduct the sale. *Ex parte Lees*. 2 Dea. & Chit. 360.

An application of the assignees to postpone the sale of mortgaged property, refused, where the mortgagee objects to such postponement. *Ex parte Belcher*, 1833. 2 Dea. & Chit. 587.

The Court will make no order, on a petition of the assignees, to sell any portion of the bankrupt's property by private contract, it being a matter in which they must use

their own discretion. *Ex parte Hurly*, 1833. 2 Dea. & Chit. 631.

If a petitioning creditor is assignee and equitable mortgagee, the petition for a sale must be served on the bankrupt and a creditor. *Re Parker*, 1833. 1 Mont. & B. 394.

In an action at the suit of the king, against an auctioneer, upon the bond given to make returns of sales by auction, held upon demurrer to the surrejoinder, that an estate which has been mortgaged by a person who has become bankrupt, and is sold by auction by direction of the assignees, and with the concurrence of trustees appointed to sell the estates to discharge incumbrances, &c. or with the consent of the mortgagees, is, by the stat. 6 Geo. 4. c. 16. s. 98., exempt from the auction duty. *Att. Gen. v. Winstanley*, 1831. 5 Bli. N. S. 130.

SCANDAL.

When affidavits are referred to the registrar for scandal, and one of the parties means to except to his report, the exceptions must be taken immediately the registrar certifies. *Ex parte Williamson*. 2 Dea, & Chit. 382.

A reference for scandal in an affidavit will be granted, even after the petition has been heard, but not a reference for impertinence.

Ex parte Williamson. 2 Dea. & Chit. 414.

Upon an affidavit being taken off the file for scandal, the solicitor who filed it is liable for all costs and expenses as between solicitor and client. *Ex parte Wake*, 1833. 1 Mont. & B. 259.

SCOTCH BANKRUPTCY.

The adjudication under the Scotch bankrupt act, 54 Geo. 3. c. 137., operates as diligence for the creditors of the ancestor, so that it is unnecessary for them to take any proceeding under the statute of 1661, to give them a preference over the creditors of the bankrupt heir. *Bennett v. M'Lachlan*, 1829. 4 Bli. N. S. 529.

SECOND OR THIRD COMMISSION.

It is no objection to the proof of a debt under a third commission, that the creditor might have proved it under the second commission, under which the bankrupt has obtained his certificate, if the bankrupt has not paid 15s. in the pound under the second commission. *Ex parte Morley*. 2 Dea. & Chit. 45.

The statute 6 Geo. 4. c. 16. s. 127., which vests in assignees the future effects of a bankrupt, who had before been bankrupt, or taken the benefit of an insolvent act,

and has not paid 15s. in the pound under the subsequent commission, does not apply to a bankrupt who had obtained his certificate under such subsequent commission, before that statute passed; and therefore, where *A.*, after being discharged under an insolvent act, had a commission of bankrupt issued against him, and obtained his certificate before the passing of 6 Geo. 4. c. 16., but did not pay 15s. in the pound, and he was afterwards sued on a bond executed before his discharge under the insolvent act, but not inserted in his schedule:—Held, that his certificate did not bar the action. *Carew v. Edwards*, 1832. 4 Barn. & Adol. 351.

Semble. That sec. 127 extends to cases where the former bankruptcy and certificate were anterior to the statute:—Held, that that section, where applicable, does not entitle a creditor to proceed against the bankrupt after a second certificate for a debt which he might have proved under the commission. *Robertson v. Score*, 1832. 3 Barn. & Adol. 338.

By section 127, if he has been bankrupt before and does not pay 15s. in the pound under the second commission, his person only is protected by the certificate, and his future effects vest in the as-

signees. *Robertson v. Score*, 1832. 3 Barn. & Adol. 338.

A second commission of bankrupt, pending a first, is void, and no rights pass to the assignees under it. *Nelson v. Cherrill*. 1 Moore & Scott, 452.

SECURITY.

Where the consignee transfers bills of lading to a creditor, as a security for his debt, and the consignor stops the goods in transitu, the creditor may issue a fiat against the consignee on his original debts. *Ex parte Ashton*. 2 Dea. & Chit. 5.

Court will not, under any circumstances, before hearing, order bankrupt to give security for costs. Motion for it refused with costs, to be set off against those due from bankrupt. *Ex parte Munk*. 2 Dea. & Chit. 120.

SEPARATE ESTATE.

See JOINT AND SEPARATE CREDITORS.

A testator indebted on bond devises his real estate to the bankrupt and two other trustees, for payment of his debts. The bond creditor, after the testator's death, brings an action against the bankrupt and the other devisees, and recovers a joint judgment against them:—Held, that he could not prove under the sepa-

rate commission against the bankrupt, even for the purpose of voting in the choice of assignees. *Ex parte Pearse*. 2 Dea. & Chit. 451.

SERVICE.

See also PETITION.

Substituted service of petition on respondents' solicitors. *Ex parte Cox*. 2 Dea. & Chit. 191.

Special order made for the service of a petition to annul a fiat, where the party is not to be met with. *In re Sell*. 2 Dea. & Chit. 333.

Special service of a petition to annul a fiat directed, where the petitioning creditor is not to be met with. *Ex parte Peppin*. 2 Dea. & Chit. 361.

SET-OFF.

Court will not, under any circumstances, before hearing, order bankrupt to give security for costs. Motion for it refused with costs, to be set off against those due from bankrupt. *Ex parte Munk*. 2 Dea. & Chit. 120.

B., a creditor of *A.*, employs *A.* to repair a carriage, undertaking to pay ready money for the repairs; *B.* cannot, upon offering to set off an adequate portion of the debt, require the re-delivery of the carriage, without payment of the repairs.

And if *A.* become bankrupt either before or after the completion of the repairs, his assignees may refuse to deliver up the carriage, until payment of the amount of the repairs; it not being, for this purpose, a case of mutual credit. *Clarke v. Fell*. 1 Nevile & Mann. 244. S.C. 4 Barn. & Adol. 404.

A tradesman undertook to do work upon an article delivered to him for a person to whom he was indebted, and it was agreed that the work should be paid for in ready money. He afterwards became bankrupt:—Held, that the act 6 Geo. 4. c. 16. s. 50. (which provides for the setting off of cross-demands where there has been mutual credit between the bankrupt and a party claiming on his estate,) did not in this case render the assignees liable in trover for refusing to deliver such article to the creditor on his offering to set off the price of the work against his own demand. *Clarke v. Fell*, 1833. 4 Barn. & Adol. 404.

A. and *B.* entered into partnership as brewers, *A.* bringing in, as his share of the capital, a brewhouse and other premises, which were subject to mortgages for debts due by him. *A.* retired from the business, which was continued by *B.* alone, who agreed to take the brewhouse, &c. at a valuation, but the amount was

not to be paid till the mortgages were satisfied. *B.* becomes bankrupt, and the mortgage debts remaining unpaid, his assignees, before any proof made in respect of *A.*'s debt, paid off the mortgages :—Held, that the assignees were entitled to deduct the sums paid by them from the dividends on the sum which was due to *A.* from *B.* at the time of his bankruptcy. *Rowe v. Anderson*, 1831. 4 Sim. 267.

SHERIFF.

See also INDEMNITY.

Goods were seized and sold under a *fi. fa.* by a chief bailiff of a franchise, having sole execution of writs therein, after an act of bankruptcy committed by the defendant, but without knowledge thereof, and before the commission issued : Held, that trover would lie by the assignees against the chief bailiff, as the property in the goods vested in them by relation to the act of bankruptcy. *Hutton v. Balme*, (in error) 2 Tyr. 620 ; reversing *Balme v. Hutton*, Id. 17. S. C. 3 Moore & S. 1. 1 Crompt. & M. 262.

Where, in a case of a claim by assignees to goods taken by a sheriff under an execution, a sheriff obtains the benefit of the Interpleading Act, 1 & 2 W. 4. c. 58. s. 6., by a rule calling on the plaintiffs in the action and the assignees to appear and maintain or relinquish their claims thereto, *semble*, the costs of necessary possession by

the sheriff will not be allowed, but he will be suffered to withdraw from possession if the plaintiffs do not appear to the rule.

Qu. If the Court has power to award such costs. *Field v. Cope*. 2 Tyrw. 458.

The sheriff sold goods under a *fi. facias*, after a secret act of bankruptcy committed by the debtor, and, after notice of the act of bankruptcy, paid over the proceeds to the execution creditor, under an indemnity :—Held, that the assignee might recover the amount from the sheriff in an action for money had and received. *Young v. Marshall*. 1 Moore & Scott, 140. S. C. 8 Bing. 43. See this case in another stage, 2 Dea. & Chit. 589.

The sheriff seized goods under a writ of *fi. fa.* on the 16th June, and remained in possession, taking no steps to effect a sale, though urged so to do by the plaintiff's attorney. On the 5th of October a commission of bankrupt was sued out against the debtor, and the goods were delivered up by the sheriff to the assignees under an indemnity, and *nulla bona* returned to the *fi. fa.* *Quære*, whether, under these circumstances, the sheriff is not liable to an action on the case at the suit of the execution creditor, for the loss of the fruits of his judgment. *Aireton v. Davis*. 3 Moore & S. 138.

The sheriff is liable to an action for not selling under a *fi. fa.* with reasonable expedition. *S. C.* 9 Bing. 740.

A sheriff is liable in trover for having sold, after notice of assignment to the provisional assignee, the goods of an insolvent taken in execution under a judgment or cognovit, after the commencement of the insolvent's imprisonment, but before the assignment to the provisional assignee. *Groves v. Cowham.* 10 Bing. 5.

Under a *fi. fa.* upon a judgment founded on a warrant of attorney, the sheriff seized at eleven o'clock of the 13th of August; a commission of bankrupt issued against the debtor at a later hour of the 18th of October in the same year. The sale took place subsequently to the issuing of the commission:—Held, 1st, That the seizure was a "levying" within 6 *Geo.* 4. c. 16. s. 81. 2dly. That more than two months had elapsed between the seizure and the issuing of the commission. 3dly. That the execution was not within the 108th section. *Godson v. Sanctuary.* 1 Nev. & Man. 52. *S. C.* 4 B. & Adol. 255.

SHIP.

By the Register Act, 6 *Geo.* 4. c. 110. s. 39. the officers of Customs are directed not to register bills of sale of ships, which at the time

they are mortgaged are absent from port, till thirty days have elapsed from their arrival in port. Two ships, and 16-64th parts or shares of a third, were mortgaged while at sea by bill of sale to *W. and Co.*, which bill of sale was registered by the officers of Customs of the port to which they belonged, before their return to port. One ship afterwards returned, but no indorsement of the bill of sale was made on her certificate of registry. After being insured, she sailed again within thirty days on another voyage, in which she was lost. By a bill of sale of a subsequent date, (to which *W. and Co.* were parties,) after reciting the prior mortgage to them, the same mortgagor assigned to *J. and Co.* the same ships and shares, with the policies effected on two of them, and the sum payable by certain charterers for the hire of the third, with all his equity of redemption in the said ships, freight, monies, and premises, subject to the prior mortgage to *W. and Co.*, and to their power of sale. This bill of sale was also registered before the return of any of the ships to port. The mortgagor became bankrupt. Two of the ships returned, and their certificates of registry were duly indorsed within thirty days, with the two bills of sale in the order of their dates:—Held, that the second bill of sale was valid under 6 *Geo.* 4. c. 110. ss. 31 & 37.

against the assignees of the bankrupt as to the interests in the ships which it purported to assign to mortgagees, notwithstanding the mortgagor's bankruptcy occurred before the lapse of thirty days after the ship arrived in port. So also as to the policies of insurance, and monies due on the charter-party. *Ex parte Jones*. 2 Tyr. 671. S.C. 2 Crompt. & J. 513.

SOLICITOR AND SOLICITOR AND CLIENT.

Official assignee cannot, under 1 & 2 Will. 4. c. 56. s. 22., take bankrupt's money out of the hands of a solicitor without discharging his lien. *Ex parte Bowden*. 2 Dea. & Ch. 182.

Where an order made in bankruptcy reserves further directions and costs, a subsequent application to the Court, as to the costs merely, may be entertained by motion; but if it is by way of further directions, it must be by petition. The solicitor for the respondents ought to have notice of such an application, as well as the respondents themselves. *Ex parte Shadbolt*. 2 Dea. & Ch. 286.

Although the solicitor's bill has been paid, yet it will be ordered to be taxed, on application of the assignees, without any special reason being assigned for the taxation. *Ex parte Pickering*. 2 Dea. & Ch. 387.

Order made on the solicitor to deliver up the proceedings, and pay over monies to the assignees. *Ex parte Hudson*, 1832. 2 Dea. & Ch. 507.

If a solicitor refuses to deliver the proceedings to the assignee, the order is of course with costs. *Ex parte Crowe*, 1832. 1 Mont. & B. 90.

A summary application being made against three attornies, jointly, to pay over to the assignees a sum of money which they had received as the bankrupt's solicitors under an order of the Court of Chancery: Held, not sustainable, as they were not all collectively attornies of this court. *Quære*, whether such an order would have been made, if they had been all attornies of this court. *Ex parte Hicks*, 1833. 2 Dea. & Chit. 573. S. C. 1 M. & B. 256.

The solicitor for the petitioning creditor, on the commission being superseded, writes to the bankrupt, "I am ready and hereby offer to allow and pay the costs" incurred by the bankrupt in petitioning for the supersedeas:—Held, that the solicitor was personally liable on this undertaking, and that the bankrupt might petition for an order on the solicitor to pay the costs, notwithstanding a subsequent commission had issued against him,

under which he had not obtained his certificate; his assignees disclaiming all interest in the matter. *Ex parte Bentley*, 1833. 2 Dea. & Chit. 578.

The defendant, a solicitor for the London creditors of a country bankrupt, wrote a letter to the solicitor for the country creditors, stating, "I am willing, on behalf of the London creditors, to bear two-thirds of the expense of Messrs. B. and B., or such barrister as you may think fit, for resisting K.'s proof under the commission, and investigating the accounts of the assignees at the meeting on the 18th instant; and I do hereby undertake to bear and pay, on behalf of the creditors, two-thirds of the expenses incident thereto accordingly." Another meeting having been appointed, the defendant declared he had no objection to bear, as before, the proportion of the expense of a barrister. Five meetings in all took place for the first-named object:—Held, that the defendant was personally liable to pay two-thirds of the expenses of all the meetings. *Hall v. Ashurst*. 3 Tyrw. 420.

An attorney, who receives a deed from his client, and is compelled to produce it by Commissioners of bankrupt, and afterwards receives it back from them under an undertaking to produce it again, if re-

quired, may nevertheless refuse to produce it in an action brought by the assignees of the bankrupt, under whose commission he was compelled to produce it. *Nixon v. Moyah*. 2 Mood. & M. 76.

In an action on an attorney's bill by the assignees of the attorney, who had become bankrupt, an order for taxing the bill was obtained, on an undertaking to pay the amount taxed, with the costs of the action, more than one-sixth of the bill having been disallowed:—Held, that the costs of taxation could not be allowed to the plaintiff as costs in the action. *Featherstonhaugh v. Reen*. 1 Crompt. & M. 495.

Costs against solicitor for improper petition. *Ex parte Williamson*, 1833. 1 Mont. & B. 266.

Upon an affidavit being taken off the file for scandal, the solicitor who filed it is liable for all costs and expenses as between solicitor and client. *Ex parte Wake*, 1833. 1 Mont. & B. 259.

SPECIAL CASE.

It is not discretionary in the Court of Review to grant a special case, where a party is entitled to appeal; but he has a right to it, if his facts are properly stated. *Ex parte Hinton*. 2 Dea. & Chit. 407.

It is reported to have been said by

Lord *Brougham* that the Judges of the Court of Review ought not to exercise a discretion as to the suitor's right to appeal. (*Ex parte Cunningham*. 1 Mont. & B. 285.) But in *Ex parte Hawley*, 22d November 1833, (*post*, 3 Dea. & Chit.,) Sir *G. Rose* said that he conceived the above report to be incorrect; and at all events he could not subscribe to such a doctrine: and the other judges concurred in the observation.

STAMP.

A joint and several promissory note was made by several parties concerned in a joint undertaking, for the purpose of securing the repayment of a loan of money; and one of the parties signs it some days after the party who borrowed the money:—Held, that the note did not require an additional stamp, if the last signature was put before the money was advanced, or if the party last signing had promised to sign the note before the advance of the money, notwithstanding it might not have been signed till afterwards. *Ex parte White*. 2 Dea. & Chit. 334.

STATUTE OF LIMITATIONS.

If an application for payment of a dividend is not made until after the statute of limitations has run, Q. if not lapsed. *Ex parte Brunger*, 1833. 1 Mont. & B. 415.

STATUTE, CONSTRUCTION OF.

A. covenants to pay annuity in default of *B.*, *A.* becomes bankrupt before any default; the annuitant cannot prove against *A.*'s estate, he not having contracted a debt until the default made either under the 54th or 56th clauses of 6 Geo. 4. *Ex parte Thompson*. 2 Dea. & Chit. 126. S. C. 1 M. & B. 219.

Where bankrupt's estate is exactly sufficient to pay 10s. in the pound, he is not entitled to 5 per cent. allowance: and dividend being declared, he cannot claim any allowance out of it. *Ex parte Petheridge*. 2 Dea. & Chit. 137. S. C. 1 M. & B. 161.

The giving up of a business, in consideration of an annuity, is not such a consideration as can be valued under the 6 Geo. 4. c. 16. s. 54.; that section being confined to money considerations. *Ex parte Saxe*. 2 Dea. & Chit. 172. S. C. 1 M. & B. 134.

Official assignee cannot, under 1 & 2 Will. 4. c. 56. s. 22., take bankrupt's money out of the hands of a solicitor, without discharging his lien. *Ex parte Bowden*. 2 Dea. & Chit. 182.

In consideration of *A.* allowing *B.* to draw upon him and accept his drafts, *C.* guarantees to him the

payment of the amount of all such acceptances. *C.* becomes bankrupt, when the acceptances are not yet due:—Held, that after the acceptances have become due, and *B.* has neglected to provide for them, *A.* is entitled to prove the amount against *C.*'s estate, under the 6 *Geo.* 4. c. 16. s. 56. *Ex parte Myers.* 2 Dea. & Chit. 251. S. C. 1 M. & B. 229.

Where the bankrupt, after the choice of assignees, petitions to reverse the adjudication, under the 17th section of 1 & 2 *Will.* 4. c. 56., the assignees are not prevented from adducing further evidence to establish the act of bankruptcy, upon which the adjudication of the Commissioner proceeded. *Ex parte Jackson,* 1833. 2 Dea. & Chit. 601. S. C. 1 M. & B. 394.

Semble, that s. 127 of 6 *Geo.* 4. c. 16. extends to cases where the former bankruptcy and certificate were anterior to the statute: but held, that that section, where applicable, does not entitle a creditor to proceed against the bankrupt after a second certificate, for a debt which he might have proved under the commission. *Robertson v. Score,* 1832. 3 Barn. & Adol. 338.

Indictment, after stating that a commission of bankrupt had issued against *A.*, by virtue of which the Commissioners adjudged him to be

a bankrupt, charged that he and other defendants conspired to conceal a part of his personal estate: Held, that even since the statute 6 *Geo.* 4. c. 16. s. 112., such an indictment is defective for not showing that the party had actually become bankrupt. *Rex v. Jones,* 1832. 4 Barn. & Adol. 345.

The stat. 6 *Geo.* 4. c. 16. s. 127., which vests in assignees the future effects of a bankrupt who had before been bankrupt, or taken the benefit of an insolvent act, and has not paid 15s. in the pound under the subsequent commission, does not apply to a bankrupt who had obtained his certificate under such subsequent commission, before that statute passed; and, therefore, where *A.*, after being discharged under an insolvent act, had a commission of bankrupt issued against him, and obtained his certificate before the passing of 6 *Geo.* 4. c. 16., but did not pay 15s. in the pound, and he was afterwards sued on a bond executed before his discharge under the insolvent act, but not inserted in his schedule, it was held, that his certificate did not bar the action. *Carew v. Edwards,* 1832. 4 Barn. & Adol. 351.

If a clerk and foreman is engaged at a weekly salary, and to have two suits of clothes per annum, it is a

yearly hiring within section 48 of 6 Geo. 4. c. 16. The words "six months," in sect. 48, mean "six lunar months." *Ex parte Humphreys*, 1833. 1 Mont. & B. 413.

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In an action at the suit of the king against an auctioneer, upon the bond given to make returns of sales by auction, held, upon demurrer to the surrejoinder, that an estate which has been mortgaged by a person who has become bankrupt, and is sold by auction by direction of the assignees, and with the concurrence of trustees appointed to sell the estates to discharge incumbrances, &c., or with the consent of the mortgagees, is, by the stat. 6 Geo. 4. c. 16. s. 98., exempt from the auction duty. *Att. Gen. v. Winstanley*, 1831. 5 Bli. N. S. 130.

The act 1 & 2 Will. 4. c. 53. s. 42., does not give validity to commissions of bankrupt founded on concerted acts of bankruptcy; and therefore the execution of a deed, whereby a trader assigns all his property to a trustee for the benefit of all his creditors, is not an

act of bankruptcy sufficient to support a commission founded on the petition of a creditor who was either party or privy to such deed. *Marshall v. Barkworth*, 1833. 4 Barn. & Adol. 508.

It is a good answer to a plea of bankruptcy, that the certificate was obtained by fraud, though the enactment to that effect, 5 Geo. 2. c. 30. s. 7. is not repeated in 6 Geo. 4. c. 16. *Horne v. Ion*, 1832. 4 Barn. & Adol. 78.

A fi. fa. was sued out on a judgment entered up under a warrant of attorney, and the sheriff seized the goods before ten in the forenoon of the 13th of August, and sold the same ten days afterwards. On the 13th of October following, about noon, a commission issued against the defendant, under which he was declared a bankrupt:—Held, first, that the seizure of the goods by the sheriff was a sufficient executing or levying, within the meaning of those words in the statute 6 G. 4. c. 16. s. 81. Secondly, that more than two calendar months had elapsed between the execution and the issuing of the commission. Thirdly, that although the execution issued on a judgment entered up in pursuance of a warrant of attorney, yet, having been executed more than two months before the issuing of the commission, it was protected

by section 81, and not taken out of that section by the proviso in section 108. *Semble*, that that proviso only applies to executions executed within two calendar months before the issuing of a commission. *Godson v. Sanctuary*, 1832. 4 Barn. & Adol. 255.

An annuity granted by *A.* to *B.* was secured by a covenant by *C.*, a surety, to pay the annuity in case *A.* made default, and by a judgment for 2,100*l.* entered up against *A.* and *C.* The annuity remained unpaid from January 1823, *A.* having left the country, and in February 1824, *C.* became bankrupt, and afterwards obtained his certificate. *C.* having died, *B.* filed a bill to have the arrears of the annuity paid out of his real and personal estates:—Held, that neither the value of the annuity nor the sum due on the judgment was proveable under *C.*'s commission, and therefore that his certificate was not a bar to the plaintiff's demand. *Johnson v. Compton*, 1830. 4 Sim. 37.

The 6 *Geo.* 4. c. 16. s. 54. 55. 56. has not a retrospective effect so as to entitle the grantee of an annuity to prove against the estate of the surety, whose bankruptcy took place before the passing of that act. *Semble*, *Johnson v. Compton*. 4 Sim. 37.

STAYING DIVIDENDS.

Where a creditor sent up the proper documents to prove his debt at a dividend meeting, and his solicitor forgot the day; another meeting was appointed at his expense, to enable him to prove his debt, the payment of the dividend being ordered to be stayed in the meantime, and to be calculated afresh in case he substantiated his proof. *Re Graham and Tate*, 1833. 2 Dea. & Chit. 554.

STAYING PROCEEDINGS.

An appeal pending is not a sufficient ground for staying proceedings, more especially when it is plain that the appeal is brought for the purpose of delay. *Ex parte Hinton*. 2 Dea. & Ch. 407.

STAYING ADJUDICATION.

See ADJUDICATION.

STAYING ADVERTISEMENT.

See ADVERTISEMENT.

STAYING CERTIFICATE, &c.

See PETITION.

STEAM ENGINES.

A tenant in fee of a cotton-mill, in which there was a steam-engine, boilers, &c. mortgaged the mill, engine, boilers, &c. to *B.*, but remained in possession until his bankruptcy. The entablature plate of the engine, which, however, formed no part of the working apparatus, was fixed to the free-

hold of the mill, every other part of the engine was secured by bolts and screws, and might be removed without injury to the building:—Held, that the steam-engine was not in the order and disposition of *A.* at his bankruptcy. *Hubbard v. Bagsham*, 1831. 4 Sim. 326.

STOPPAGE IN TRANSITU.

If a London banker, having a branch bank at Edinburgh, stops payment in London; and after the stoppage, but before notice, a customer pay to the agent at the Edinburgh bank notes and cash, to be remitted to London; and at that time the banker is indebted to the agent, and the agent after the notice, in pursuance of a special direction from the banker, receive money from other agents, for the purpose of forwarding to London; and a fiat issue against the banker, at which period the monies in the hands of the agent are more than sufficient to cover the amount due to him from the banker; but the amount which he had at the time of notice of the stoppage, including the bank notes, was insufficient; and the customer require the agent to return the bank notes, which he does not comply with; and the agent refuse to pay any part of the money to the assignees; and the Court of Session in Scotland order the agent to pay, without prejudice, the balance of monies, after deducting

in the meantime the amount due to him, to the assignees, which he does; and afterwards it appearing clear that he was not entitled to retain any part of the sum which he received from the other agents after notice, he pay to the assignees the difference between the sum paid to the assignees under the order of the Court of Session, and the amount so received from the other agents:—Ordered, that the assignees must refund to the customer the amount paid in by him. Affirmed by L. C. *Ex parte Cunningham*, 1833. 1 Mont. & B. 269. *S. P. Ex parte Solomons*, *id.* 286.

STRANGER TO COMMISSION.

See also PRIVACY.

On a summary application against the assignees for delivery up of goods seized by them as the property of the bankrupt under the fiat, out of the hands of the petitioner, (a stranger to the bankruptcy,) who claimed the goods as his, but who, together with the bankrupt, had been indicted for a conspiracy in secretly and fraudulently removing the goods, which indictment was still pending; the Court refused to decide on the petition till after the trial, on the ground that it would tend to disclose the assignees' evidence in support of the indictment. *Ex parte Heath*. 2 Dea. & Ch. 140. S. C. 1 M. & B. 169.

SUBSTITUTION OF PETITIONING CREDITOR'S DEBT.

Costs of the application to substitute another debt for the debt of the petitioning creditor, ordered to be paid by the petitioning creditor. *Ex parte Lloyd*, 1832. 2 Dea. & Chit. 506.

When the Commissioners find the petitioning creditor's debt insufficient to support the fiat; they should also expressly find, that the debt proposed to be substituted was incurred not anterior to the petitioning creditor's debt. *Ex parte Hunter*, 1832. 2 Dea. & Chit. 507.

SUBSTITUTION OF SERVICE.

See SERVICE—PETITION.

SUMMARY PROCESS.

See also RESTITUTION.

On a summary application against the assignees for delivery up of goods, seized by them as the property of the bankrupt under the fiat, out of the hands of the petitioner (a stranger to the bankruptcy), who claimed the goods as his, but who, together with the bankrupt, had been indicted for a conspiracy, in secretly and fraudulently removing the goods, which indictment was still pending; the Court refused to decide on petition till after the trial, on the ground that it would tend to disclose the assignees' evidence in support of the indictment. *Ex*

parte Heath. 2 Dea. & Chit. 140. S. C. 1 M. & B. 169.

The Court will not interfere, by ordering the messenger to withdraw from the possession of goods which he has seized under the bankruptcy, in any case of reputed ownership. *Ex parte Harling*. 2 Dea. & Chit. 389.

SUPERSEDEAS.

See also PETITION.

A commission issues against a man of the name of "Wicks," under which name he traded and contracted debts, although "Knox" was his real name. Two years afterwards, and before the bankrupt had passed his last examination under the commission, a fiat is issued against him by his right name. The commission was preferred to the subsequent fiat. *Ex parte Sambourne*. 2 Dea. & Chit. 22.

Where the time for opening a fiat expires by the voluntary act of the petitioning creditor, and it appears that it was issued under suspicious circumstances, namely, for effecting a compromise with the creditors, and not with a *bond fide* intention of working it; and a second fiat is issued by another creditor under Lord Loughborough's general order, the Court will not supersede the second fiat, merely because it was issued by a

creditor who was a party to the intended compromise under the first, unless it is clearly for the advantage of the general creditors that the first should stand, and the second be superseded. *Ex parte Anjer*. 2 Dea. & Chit. 67.

Court will not supersede commission thirty years old, unless all creditors consent. *Ex parte Lupton*. 2 Dea. & Chit. 136.

Where all creditors consent to supersedeas except *A.*, who is abroad, and *B.* holds power of attorney from *A.*, authorizing him to consent:—Held, *B.* was entitled to consent; and an attested copy of power ordered to be filed with the proceedings. *Ex parte Hamilton*, 2 Dea. & Chit. 139.

After a lapse of twenty years, and the death of the petitioning creditor and the bankrupt, the Court will not entertain a petition for a supersedeas on the ground of fraud. *Ex parte Granger*. 2 Dea. & Chit. 459.

A commission issued by one partner against another, not for the purpose of distributing the bankrupt's effects among his creditors, but for the sole purpose of dissolving the partnership, is supersedable. *Ex parte Christie*, 1832. 2 Dea. & Chit. 465. Confirmed on ap-

peal, *id.* 488. S. C. 1 M. & B. 314, 329.

Where the bankrupt is ready to pay all his creditors in full, and the only creditor whose consent is wanting to the supersedeas is abroad, the bankrupt may apply to pay the amount of that creditor's debt into Court, in order to prevent any delay in obtaining the supersedeas. *Ex parte Hamilton*, 1832. 2 Dea. & Chit. 519.

Where a bankrupt, who had been for some time previously living in Brompton Square, was described in the fiat of "Arundel Street, in the county of Middlesex," where he had taken temporary lodgings only four days before the issuing of the fiat; the fiat was superseded on the ground of misdescription. *Ex parte Tanner*, 1833. 2 Dea. & Chit. 563. S. C. 1 M. & B. 390.

The Court refused to supersede a commission upon consent, as one of the bankrupts had not surrendered, but superseded as to the bankrupt who had surrendered. *Ex parte Knowlson*, 1833. 1 Mont. & B. 416.

Consent of official assignee to supersedeas, upon consent of creditors, not necessary. *Ex parte Parker*, 1833. 1 Mont. & B. 412.

Upon supersedeas by consent a purchaser is entitled to be indemnified against judgments outstanding before the bankruptcy. *Ex parte Lautour*, 1832. 1 Mont. & B. 89.

SURETY.

A. covenants to pay annuity on default of *B.*; *A.* becomes bankrupt before any default. The annuitant cannot prove against *A.*'s estate, he not having contracted a debt until the default made, either under the 54th or 56th clauses of 6 Geo. 4. *Ex parte Thompson*. 2 Dea. & Chit. 126. S. C. 1 M. & B. 219.

An administrator, having received assets of the intestate, converted them to his own use, and became bankrupt before he had exhibited an inventory, or made his account, pursuant to the bond given under the statute of distributions, 22 Car. 2. c. 10, and before any decree to pay and deliver the residue to the next of kin was obtained. The Ecclesiastical Court discharged him from the suit there, he having obtained his certificate as a bankrupt:—Held, that his malfeasance, in converting to his own use the intestate's assets, so that they were entirely lost to his estate, was a breach of the clause of the condition "well and truly to administer" them; and consequently that the surety in the administration bond was liable for the full amount of

the money misapplied. *Archbishop of Canterbury v. Robertson*. 3 Tyrw. 390.

An accommodation indorser is a person liable to pay the bill for the party accommodated; against whom, therefore, if he become bankrupt, such indorser, though not called on to pay the bill till after the bankruptcy, may prove the amount under sect. 52 of 6 Geo. 4. c. 16. And the bankrupt being discharged from any suits for the amount by his certificate, is, in an action on the bill, a competent witness for such indorser. *Basset v. Dodgin*. 9 Bing. 653. S. C. 2 Moore & S. 777.

A. being a joint surety with *B.* for *C.*, is compelled to pay the debts after the bankruptcy of *B.* The certificate of *B.* is no answer to the action of *A.* for contribution. *Clements v. Langley*, 2 Nev. & M. 269.

An annuity granted by *A.* to *B.* was secured by a covenant by *C.*, a surety, to pay the annuity in case *A.* made default, and by a judgment for 2,100*l.* entered up against *A.* and *C.* The annuity remained unpaid from Jan. 1823, *A.* having left the country, and in Feb. 1824, *C.* became bankrupt, and afterwards obtained his certificate. *C.* having died, *B.* filed a bill to have the arrears of the annuity paid out of his real and personal estates:—

Held, that neither the value of the annuity nor the sum due on the judgment was proveable under C.'s commission, and, therefore, that his certificate was not a bar to the plaintiff's demands. *Johnson v. Compton*, 1830. 4 Sim. 37.

SURPLUS.

See also BANKRUPT'S ALLOWANCE.

Where part of the account between two mercantile houses, which became bankrupt, consists of bills that may be proved against both estates, there can be no proof in respect of those bills as between the two houses, unless there is a surplus after satisfying the holders of the bills. *Ex parte Laforest*, 2 Dea. & Chit. 199. S. C. 1 M. & B. 363.

SURPRISE.

Where, upon the trial of an issue, to try whether there was a good petitioning creditor's debt, the bankrupt took an objection to the constitution of the debt, which he never alleged in his petition to supersede the commission, and the jury found a verdict against the petitioning creditor, the Court granted a new trial, on the ground of surprise. *Ex parte Christie*. 2 Dea. & Chit. 461.

SURRENDER.

See BANKRUPT'S SURRENDER.

TAXATION.

See also COSTS.

Petitioning creditor's bill ordered to be taxed by an officer of the Court, when objectionable charges have been allowed by the Commissioners. *Ex parte Hatterley*. 2 Dea. & Chit. 373.

Although the solicitor's bill has been paid, yet it will be ordered to be taxed, on application of the assignees, without any special reason being assigned for the taxation. *Ex parte Pickering*. 2 Dea. & Chit. 387.

A fiat was sued out on the 7th June by an attorney against his debtor, for the amount of his bill of costs, and the bankrupt was shortly afterwards discharged under the Insolvent Act, having inserted the amount of the attorney's bill in his schedule. The bankrupt passes his last examination, and on the 4th December petitions for an order to tax the attorney's bill, with a view of superseding the fiat, on the ground of the insufficiency of the petitioning creditor's debt:—Held, that the bankrupt could not, after lying by so long, and after his previous admission of the debt, apply for such an order. *Ex parte Gingell*, 1833. 2 Dea. & Chit. 546.

It was ordered that the costs of all

proceedings in this Court, in town fiats, should be referred to their own officer, Mr. Gregg, the deputy registrar, for taxation; and that no reference should in future be directed to a master for this purpose. The Commissioners would merely tax the petitioning creditor's costs, and the costs of assignees under the fiat. *Practice*, 1833. 2 Dea. & Chit. 586.

TIME.

See also ENLARGEMENT OF TIME— LENGTH OF TIME.

Where affidavits in support of a petition are very voluminous, the Court will give respondent time to answer them, upon payment of costs, although the petition is in the paper for hearing, and twelve days have elapsed since the affidavits were filed. *Ex parte Williamson*. 2 Dea. & Chit. 317.

Where a petition is in the paper for hearing on Monday, and the respondent only files his affidavit on the previous Saturday, the petitioner is entitled to an order for time to answer them. *Ex parte Gladstet*. 2 Dea. & Chit. 330.

TIME, COMPUTATION OF.

A *fi. fa.* was sued out on a judgment entered up under a warrant of attorney, and the sheriff seized

the goods before ten in the forenoon of the 13th of August, and sold the same ten days afterwards. On the 13th of October following, about noon, a commission issued against the defendant, under which he was declared a bankrupt:—Held, first, that the seizure of the goods by the sheriff was a sufficient executing or levying, within the meaning of those words in the statute 6 Geo. 4. c. 16. s. 81.; secondly, that more than two calendar months had elapsed between the execution and the issuing of the commission; thirdly, that although the execution issued on a judgment entered up in pursuance of a warrant of attorney, yet, having been executed more than two months before the issuing of the commission, it was protected by section 81., and not taken out of that section by the proviso in section 108. *Semble*, that that proviso only applies to executions executed within two calendar months before the issuing of a commission. *Godson v. Sanctuary*, 1832. 4 Barn. & Adol. 255.

If a clerk and foreman is engaged at a weekly salary, and to have two suits of clothes per annum, it is a yearly hiring within section 48 of 6 Geo. 4. c. 16. The words "six months," in section 48, mean "six lunar months." *Ex parte Humphreys*, 1833. 1 Mont. & B. 413.

TRADING.

See also BANKRUPT.

One who keeps a lodging house, supplying the guests with provisions at a small profit (such provisions not forming any common stock of the house, but being set apart for the particular individual or family for whom they are procured,) is an hotel keeper, within the meaning of the 6 Geo. 4. c. 16. s. 2., and as such subject to the bankrupt law. *Smith v. Scott*. 2 Moore & Scot, 35. S. C. 9 Bing. 14.

TROVER.

And see ACTIONS—SHERIFF.

Goods were seized and sold under a fi. fa. by a chief bailiff of a franchise, having sole execution of writs therein, after an act of bankruptcy committed by the defendant, but without knowledge thereof and before the commission issued:—Held, that trover would lie by the assignees against the chief bailiff, as the property in the goods vested in them by relation to the act of bankruptcy. *Hutton v. Balme*, (in error). 2 Tyr. 620. Reversing *Balme v. Hutton*. Id. 17.

TRUST.

Where a testator bequeaths the whole of his property to trustees, for the payment of an annuity, and other purposes, and the trustees become

bankrupt, the trust fund must be set apart for the payment of the whole annuity, without regard to the interests of the persons entitled to the residue. *Ex parte Rothwell*, 1833. 2 Dea. & Ch. 542.

A lease was granted to *W.* who afterwards committed an act of bankruptcy, and then executed a deed, stating that his name had been used in the lease in trust for *R.* and declaring the trust accordingly; a bill was filed on behalf of the creditors of *W.* under the commission, claiming the lease as part of his estate; and the Court directed an issue to try whether *W.*'s name was used in the lease as a trustee for *R.*:—Held, that the issue was properly directed. The jury having found a verdict in the affirmative:—Held, that the declaration of trust was valid, though executed after bankruptcy, and that the lease did not pass to *W.*'s assignees. *Gardner v. Rowe*, 1828. 5 Russ. 258.

A ship-owner assigned $\frac{1}{8}$ ths of a ship to his creditor, in trust to sell and retain his debts, and afterwards became bankrupt. The ship was afterwards sold:—Held, that the creditor must bear his proportion of the seaman's wages and other expenses on account of the ship. *Douglas v. Russell*, 1831. 4 Sim. 533.

TRUSTEES.

See BANKRUPT TRUSTEES.

Where trustees under marriage settlement lend wife's money to husband with her consent, and husband becomes bankrupt, they cannot, on behalf of wife, prove for interest of money, but only for the principal, she having been supported by husband since marriage; upon the principles applicable to wife's pin-money. *Semble*, secus if they prove to save themselves from consequences of their own act, her consent not having been given. *Ex parte Green*. 2 Dea. & Ch. 113.

Where order of Court is necessary to enable a party to prove, he cannot vote or sign certificate; for instance, trustees, executors, &c. *Ex parte Wyatt*. 2 Dea. & Chit. 211.

Where a conveyance by way of mortgage is made to a trustee for the mortgagee, in trust to sell, and the trustee becomes bankrupt, the mortgagor should join in the application, for the appointment of another trustee. *Ex parte Orgill*. 2 Dea. & Ch. 413.

Where a trustee becomes bankrupt, a new one may be appointed, on petition, without any reference to the master; although the bankrupt had no portion of the trust property in his hands. *Ex parte*

Buffery, 1833. 2 Dea. & Chit. 576.

Bankrupt trustee ordered to be removed, and to convey the trust property to a new trustee, under the 79th section of the Bankrupt Act; but no necessity for the assignees to join in the conveyance. *Ex parte Painter*, 1833. 2 Dea. & Ch. 584.

UNCLAIMED DIVIDENDS.

The Court will not order unclaimed dividends to be distributed among the creditors, unless the creditors on whose debts they are payable have ample notice that they have been declared; and more especially when a long period has elapsed before any dividend has been made. *Semble*, that the unclaimed dividends of joint creditors can only go to the joint creditors, and those of separate creditors to the separate creditors. *Ex parte Fedden*. 2 Dea. & Ch. 379.

USURY.

The charge of 10s. per cent. for commission, besides the legal interest, on a loan of money, is not usurious, if it is referable to trouble and expense *bonâ fide* incurred by the lender; although he may not be a banker, or a person engaged in trade, or although the money lent is his own, and not that of other persons. *Ex parte Gryn*. 2 Dea. & Chit. 12. See

also *Ex parte Goss*. 2 Dea. & Chit. 240.

A bill-broker, in order to get a bill discounted at 4 per cent., takes upon himself the responsibility of indorser, and charges his principal 5 per cent. discount, which is the lowest sum at which he could have done the business except for his indorsement:—Held, that although he also charged 10s. per cent. for his trouble &c., it was not usury; and that he was entitled to do so for his *del credere* commission. *Ex parte Goss*. 2 Dea. & Chit. 240.

VALUATION OF ANNUITY.

The giving up of a business in consideration of an annuity, is not such a consideration as can be valued under the 6 Geo. 4. c. 16. s. 54., that section being confined to money considerations. *Ex parte Saxe*. 2 Dea. & Ch. 172. S. C. 1 M. & B. 134.

VENDOR AND PURCHASER.

See PURCHASER.

VIVA VOCE EXAMINATION.

See EXAMINATION VIVA VOCE.

VOLUNTARY PAYMENT.

See FRAUDULENT PREFERENCE.

WARRANT OF ATTORNEY.

By the statute 3 Geo. 4. c. 39., a

warrant of attorney, not filed within twenty-one days of its execution, is declared to be fraudulent and void against the assignees under a commission afterwards sued out against the party giving it:—Held, that in order to let in the objection that the statute has not been complied with, it must first appear that there is a valid commission against the party. And *semble*, that it lies upon him who seeks to impeach it, to show that the warrant of attorney was not filed. *Aireton v. Davis*. 3 Moore & S. 138.

Such a warrant of attorney is not void generally, but only as against an assignee under a valid commission. *Id.* 9 Bing. 740.

WARRANT OF COMMITMENT.

A commitment by two Commissioners of the Court of Bankruptcy is valid; a warrant is sufficient, if enough appear to show the Court has jurisdiction. *Re Smith*, 1833. 1 Mont. & B. 418.

WAIVER.

Although an equitable mortgagee may waive his privilege to bid, the assignees must still have the conduct of the sale. *Ex parte Smith*. 2 Dea. & Chit. 60.

The petitioner, an equitable mortgagee of leasehold property, ob-

tained an order for a sale, at which 950*l.* was bid for the mortgaged premises, but they were bought in by direction of the assignees. The petitioner afterwards applied to the Commissioners for another sale, but the order they made being unsatisfactory to him as to the time of sale, he refused to accept it; and the assignees afterwards obtained another order, when the highest bidding was only 650*l.*:—Held, that the petitioner, by applying for a second sale, waived any claim against the assignees for the difference in the amount of the biddings at the first and second sale; but that he was entitled to be indemnified from the ground-rent, and all expenses incurred since the first sale. *Ex parte Baldock*. 2 Dea. & Chit. 60.

An objection to the attestation of a petition is not sustainable, after an order has already been made upon it. Where an attestation was in the following form, "Signed by the petitioners *A. B.* and *C. D.*, in the presence of *T. S.* acting as solicitor for *A. T.* solicitor for the petitioners in this matter," and it appeared that *A. T.* was not a solicitor of this Court, *semble*, nevertheless, that the attestation was good, the petitioners having appeared by counsel. *Ex parte Tanner*. 2 Dea. & Chit. 563. S. C. 1 M. & B. 390.

WIFE.

See HUSBAND AND WIFE.

WILFUL DEFAULT.

Although a Commissioner has no power, under the 106th section of 6 Geo. 4. c. 16., to charge the assignees with monies, which but for their wilful default they might have received; yet where he charged them with certain sums as received "by themselves, or their solicitors," the Court referred it back to him to ascertain the amount which the assignees, or any person for them, had received, or which but for their wilful default might have been received. *Ex parte Keys* and *Ex parte Weston*, 1833. 2 Dea. & Chit. 633.

WITNESS.

See also BANKRUPT.

The bankrupt's affidavit in support of the respondent's case, is admissible in evidence, notwithstanding he has previously made one in support of the petition. But when the party is dead, who could best have answered such affidavit, the bankrupt's allegations, uncorroborated, will not go for much. *Ex parte Gwyn*. 2 Dea. & Chit. 12.

On a petition by assignees to supersede a commission, the bankrupt's affidavit is admissible, to show that the commission was fraudu-

lently concerted. *Ex parte Bellwood.* 2 Dea. & Chit. 37.

A witness from Gravesend, having attended this Court, pursuant to a summons, being arrested for debt in Pancras Lane, City, while waiting for the conveyance home, was discharged; although he had, on leaving this Court, gone to Catherine Street, Strand. But without costs as against the officer, he not having been shown the summons to attend this Court. *Ex parte Clarke.* 2 Dea. & Chit. 99.

W., a horse-contractor, lets out a cart-horse on hire to *N. & Co.*, who have it in their possession more than a twelvemonth, and then become bankrupt:—Held, that it does not pass to their assignees, as being in their reputed ownership. On a petition by the owner for the re-delivery of the horse, and a *vivâ voce* examination of witnesses, the bankrupt is an incompetent witness. *Ex parte Wiggins.* 2 Dea. & Chit. 269. S. C. 1 Mont. & B. 168.

Quære, Where one of two joint defendants pleads bankruptcy, and a *nolle prosequi* is entered as to him, whether he is a witness for the other, to resist a prior claim against both. *Graham v. Whichelo.* 3 Tyrw. 201.

A general release by a creditor to a bankrupt is not sufficient to render the bankrupt a competent witness for the creditor, where the result of his testimony would give the creditor a right to prove under the commission. The creditor ought also to give a release to the assignee of all claim on the bankrupt's estate, and the bankrupt ought to release his claim to a surplus. *Perryman v. Steggall.* 8 Bing. 369. S. C. 1 Moore & S. 540.

The defendants indorsed bills of exchange for the accommodation of one *T.*, and to enable him to raise money by discounting them, for the purpose of taking up a former bill then due, of which they were the acceptors for his accommodation. *T.* became bankrupt, and obtained his certificate. The defendants were not called upon to pay the bill until after *T.*'s bankruptcy:—Held, that they were within the meaning of the words of the 52d section of the statute of 6 Geo. 4. c. 16. "persons liable at the issuing of the commission for a debt of the bankrupt;" and therefore that *T.*'s certificate discharged him from all liability to them on account of the bills, and rendered him a competent witness on their behalf. *Basset v. Dodgin.* 2 Moore & Scott, 777. S. C. 9 Bing. 653.





